TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 140.

THE HENRIETTA MINING AND MILLING COMPANY, APPELLANT,

vs.

JAMES I. GARDNER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JULY 23, 1902.

(16,635.)

6 4 1/2
2 7 2
3 4
3 0 6

310

(16,635.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 140.

THE HENRIETTA MINING AND MILLING COMPANY, APPELLANT,

vs.

JAMES I. GARDNER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

INDEX.

	Original.	Print.
Clerk's certificate	*a*	1
Caption	*b*	1
Transcript from district court	1	1
Complaint	1	1
Affidavit for attachment	44	30
Bond for attachment	47	31
Writ of attachment	48	31
Sheriff's return	50	32
Affidavit of non-residence	53	33
Summons	55	34
Sheriff's return	56	35
Summons	57	35
Default	59	36
Judgment	60	36
Certificate to judgment-roll	67	40
Petition for writ of error	68	40
Cost bond on writ of error	70	41

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 29, 1898.

	Original.	Print.
Supersedeas bond	73	43
Citation in error	76	44
Certificate that writ of error has been granted	79	45
Notice of exceptions to supersedeas bond	81	46
Amended petition for writ of error	84	47
Additional supersedeas bond	86	48
Indemnity bond to former sureties	89	49
Assignment of errors	91	50
Order for judgment	95	52
Clerk's certificate	97	53
Order setting cause for hearing	99	54
Hearing and submission	99	54
Judgment	100	54
Motion for rehearing	101	55
Answer to motion for rehearing	104	56
Order submitting motion for rehearing	105	56
Order denying motion for rehearing	106	57
Order allowing appeal	106	57
Order staying remittitur	106	57
Affidavit of value	107	57
Notice of appeal	108	57
Assignment of errors	109	58
Petition for appeal	111	59
Order allowing appeal	112	59
Statement of facts	113	60
Assignment of errors	115	61
Appeal bond	118	62
Order for stay, &c.	121	63
Citation	124	64
Proof of service of citation	125	64
Supersedeas bond approved by Mr. Justice Shiras	126	65

a UNITED STATES OF AMERICA, *Territory of Arizona,* } ss.:

I, J. L. B. Alexander, clerk of the supreme court of the Territory of Arizona, do hereby certify that the following pages, numbered from 1 to 123, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The Henrietta Mining and Milling Company, appellant, against James I. Gardner, appellee, as the same remain of record and on file in said office; and I further certify that no opinion has been rendered or filed in said cause, and that the citation hereunto annexed is the original citation issued therein.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the said city of Phœnix, the capital of Arizona Territory, this 28th day of June, A. D. 1897.

Seal of Supreme Court of Arizona.

J. L. B. ALEXANDER, *Clerk.*

b In the Supreme Court of Arizona.

JAMES I. GARDNER, Defendant in Error,
vs.
HENRIETTA MINING & MILLING CO., Plaintiff in Error. } No. 539.

Transcript on Petition in Error.

Filed Dec. 3, 1896.

J. L. B. ALEXANDER, *Clerk.*

1 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

JAMES I. GARDNER, Plaintiff,
vs.
HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant. } Complaint.

The above-named plaintiff for cause of action against the above-named defendant alleges for a first count and separate cause of action:

I.

That plaintiff is a resident of the city of Prescott, in the county of Yavapai, in the Territory of Arizona; that defendant is now and at all the times hereinafter mentioned was a corporation duly organized, erected, created, and existing under the laws of the State of Illinois and owning property, to wit, mining and milling property, and operating the same in the county of Yavapai, in the Territory of Arizona.

II.

That on the fifth day of May, 1894, at the said county of Yavapai, an account was stated between the plaintiff and the defendant, and

upon such statement a balance of two hundred and one dol-
2 lars and four cents was found due to the plaintiff from the defendant; that the defendant agreed to pay plaintiff the said balance of two hundred and one and four-hundredth-dollars, but has failed so to do, though payment thereof has been demanded.

Second Count.

Plaintiff, for a second count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between H. L. Scott and the defendant, and upon such statement a balance of twenty-one and $\frac{70}{100}$ dollars was found due to H. L. Scott from the defendant; which said balance of $21.70 *dollars* the defendant then and there agreed to pay.

III.

That afterwards, for value, said H. L. Scott sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

Third Count.

Plaintiff, for a third count and separate cause of action against the defendant, alleges:

3 I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between Alex. Imhoff and the defendant, and upon such statement a balance of $37.25 *dollars* was found due to Alex. Imhoff from the defendant; which said balance of $37.25 *dollars* the defendant then and there agreed to pay.

III.

That afterwards, for value, said Alex. Imhoff sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

Fourth Count.

Plaintiff, for a fourth count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 26th day of March, 1894, at the said county of Yavapai, an account was stated between A. Murray and
4 the defendant, and upon such statement a balance of $20.45 *dollars* was found due to A. Murray from the defendant; which said balance of $20.45 *dollars* the defendant then and there agreed to pay.

III.

That afterwards, for value, said A. Murray sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

Fifth Count.

Plaintiff, for a fifth count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 18th day of July, 1894, at the said county of Yavapai, an account was stated between Timothy Green and the defendant, and upon such statement a balance of $9.25 *dollars* was found due to Timothy Green from the defendant; which said balance of $9.25 *dollars* the defendant then and there agreed to pay.

III.

That afterwards, for value, said Timothy Green sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

5 *Sixth Count.*

Plaintiff, for a sixth count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 1st day of May, 1894, at the said county of Yavapai, an account was stated between Joseph Marlin and the defendant, and upon such statement a balance of $505.15 *dollars* was found due to Joseph Marlin from the defendant; which said balance of $505.15 *dollars* the defendant then and there agreed to pay.

III.

That afterwards, for value, said Jos. Marlin sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part therof, though often requested so to do.

Seventh Count.

Plaintiff, for a seventh count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

6 II.

That on or about the 2nd day of July, 1894, at the said county of Yavapai, an account was stated between C. C. Reynolds and the defendant, and upon such statement a balance of $178.65 *dollars* was found due to C. C. Reynolds from the defendant; which said balance of $178.65 *dollars* the defendant then and there agreed to pay.

III.

That afterwards, for value, said C. C. Reynolds sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

Eighth Count.

Plaintiff, for a eighth count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between Tom Huckalbey and the defendant, and upon such statement a balance of $40.50 *dollars* was found due to Tom Huckalbey from the defendant; which said balance of $40.50 *dollars* the defendant then and there agreed to pay.

III.

That afterwards, for value, said Tom Huckalbey sold, transferred and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

Ninth Count.

Plaintiff, for a ninth count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 18th day of April, 1894, at the said county of Yavapai, an account was stated between John White and the defendant, and upon such statement a balance of $58.05 *dollars* was found due to John White from the defendant; which said balance of $58.05 *dollars* the defendant then and there agreed to pay.

III.

That afterwards, for value, said John White sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

Tenth Count.

Plaintiff, for a tenth count and separate cause of action against the defendant, alleges:

8 I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 18th day of April, 1894, at the said county of Yavapai, an account was stated between Ed. White and the defendant, and upon such statement a balance of $55.50 *dollars* was found due to Ed. White from the defendant; which said balance of $55.50 *dollars* the defendant then and there agreed to pay.

III.

That afterwards, for value, said Ed. White sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

Eleventh Count.

Plaintiff, for a- eleventh count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between Dan'l Griffin and
9 the defendant, and upon such statement a balance of $23.90 *dollars* was found due to Dan'l Griffin from the defendant; which said balance of $23.90 *dollars* the defendant then and there agreed to pay.

III.

That afterwards, for value, said Dan'l Griffin sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

Twelfth Count.

Plaintiff, for a twelfth count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 15th day of May, 1894, at the said county of Yavapai, an account was stated between Dan. Griffin and the defendant, and upon such statement a balance of $70.00 *dollars* was found due to San. Griffin from the defendant; which said balance of $70.00 *dollars* the defendant then and there agreed to *apy*.

III.

That afterwards, for value, said Dan. Griffin sold, transferred, and assigned said stated account to this plaintiff, who is now the lrgal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

Thirteenth Count.

Plaintiff, for a thirteenth count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 20th day of May, 1894, at the said county of Yavapai, an account was stated between William Thomas and the defendant, and upon such statement a balance of $1,626.30 *dollars* was found due to William Thomas from the defendant; which said balance of 1,626.30 dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said William Thomas sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

14th Count.

Plaintiff, for a fourteenth count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint,
11 first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repitition.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between F. G. Parker and the defendant, and upon such statement a balance of two hundred and twenty & $\frac{59}{100}$ dollars was found due to F. G. Parker from the defendant; which said balance of 220.59 dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said F. G. Parker sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

15th Count.

Plaintiff, for a 15th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between J. L. Fisher and the defendant, and upon such statement a balance of 437 & $\frac{90}{100}$
12 dollars was found due to J. L. Fisher from the defendant; which said balance of 437 & $\frac{90}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said J. L. Fisher sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

16th Count.

Plaintiff, for a 16th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 19th day of June, 1894, at the said county of Yavapai, an account was stated between Gus Shamp and the defendant, and upon such statement a balance of 4,266 & $\frac{59}{100}$ dollars was found due to Gus Shamp from the defendant; which said balance of 4,266 & $\frac{59}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Gus Shamp sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

13 *17th Count.*

Plaintiff, for a 17th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 1st day of August, 1894, at the said county of Yavapai, an account was stated between J. T. Shull and the defendant, and upon such statement a balance of 171 dollars was found due to J. T. Shull from the defendant; which said balance of 171 dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said J. T. Shull sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

18th Count.

Plaintiff, for a- 18th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

14 That on or about the 1st day of June, 1894, at the said county of Yavapai, an account was stated between Christine Johnson and the defendant, and upon which statement a balance of 227 & $\frac{50}{100}$ dollars was found due to Christine Johnson from the defendant; which said balance of 227 & $\frac{50}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Christine Johnson sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

19th Count.

Plaintiff, for a 19th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 1st day of June, 1894, at the said county of Yavapai, an account was stated between Alfred Quetu and the defendant, and upon such statement a balance of 239 dollars was found due to Alfred Quetu from the defendant; which said balance of 239 dollars the defendant then and there agreed to pay.

15 III.

That afterwards, for value, said Alfred Quetu sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

20th Count.

Plaintiff, for a 20th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 1st day of May, 1894, at the said county of Yavapai, an account was stated between J. P. Bruce and the defendant, and upon such statement a balance of 18 & $\frac{88}{100}$ dollars was found due to J. P. Bruce from the defendant; which said balance of 18 & $\frac{88}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said J. P. Bruce sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

16 *21st Count.*

Plaintiff, for a 21st count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 1st day of March, 1894, at the said county of Yavapai, an account was stated between A. O. Brodie and the defendant, and upon such statement a balance of two & $\frac{50}{100}$ dollars was found due to A. O. Brodie from the defendant; which said balance of two & $\frac{50}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said A. O. Brodie sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

22nd Count.

Plaintiff, for a 22nd count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

17

II.

That on or about the 1st day of April, 1894, at the said county of Yavapai, an account was stated between Commercial Mining Company, a corporation, and the defendant, and upon such statement a balance of 25 dollars was found due to the Commercial Mining Company from the defendant; which said balance of 25 dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Commercial Mining Company sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

23rd Count.

Plaintiff, for a 23rd count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 2nd day of April, 1894, at the said county of Yavapai, an account was stated between Gus Shamp and the defendant, and upon such statement a balance of 754 & $\frac{35}{100}$ dollars was found due to Gus Shamp from the defendant; which said balance of 754 & $\frac{35}{100}$ dollars the defendant then and there agreed to pay.

18

III.

That afterwards, for value, said Gus Shamp sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part whereof, though often requested so to do.

24th Count.

Plaintiff, for a 24th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 9th day of April, 1894, at the said county of Yavapai, an account was stated between J. P. McLaughlin and the defendant, and upon such statement a balance of 45 & $\frac{30}{100}$ dollars was found due to J. P. McLaughlin from the defendant; which said balance of 45 & $\frac{30}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said J. P. McLaughlin sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

19 *25th Count.*

Plaintiff, for a 25th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 23rd day of March, 1894, at the said county of Yavapai, an account was stated between Joseph Wilson and the defendant, and upon such statement a balance of 36 & $\frac{15}{100}$ dollars was found due to Joseph Wilson from the defendant; which said balance of 37 & $\frac{15}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Joseph Wilson sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

26th Count.

Plaintiff, for a 26th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

20

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between John Warren and the defendant, and upon such statement a balance of 16 & $\frac{45}{100}$ dollars was found due to John Warren from the defendant; which said balance of 16 & $\frac{45}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said John Warren sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

27th Count.

Plaintiff, for a 27th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 7th day of May, 1894, at the said county of Yavapai, an account was stated between Anton Rossi and the defendant, and upon such statement a balance of 85 & $\frac{50}{100}$ dollars was found due to Anton Rossi from the defendant; which said balance of 85 & $\frac{50}{100}$ dollars the defendant then and there agreed to pay.

21

III.

That afterwards, for value, said Anton Rossi sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

28th Count.

Plaintiff, for a 28th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 31st day of July, 1894, at the said county of Yavapai, an account was stated between G. A. Stone and the defendant, and upon such statement a balance of 80 dollars was found due to G. A. Stone from the defendant; which said balance of 80 dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said G. A. Stone sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

22 *29th Count.*

Plaintiff, for a 29th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 1st day of May, 1894, at the said county of Yavapai, an account was stated between F. R. Stees and the defendant, and upon such statement a balance of 40 dollars was found due to F. R. Stees from the defendant; which said balance of 40 dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said F. R. Stees sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

30th Count.

Plaintiff, for a 30th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 7th day of May, 1894, at the said county of Yavapai, an account was stated between John Harter and the defendant, and upon such statement a balance of 193 & $\frac{40}{100}$ dollars was found due to John Harter from the defendant; which said balance of 193 & $\frac{60}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said John Harter sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

31st Count.

Plaintiff, for a 31st count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 9th day of September, 1894, at the said county of Yavapai, an account was stated between John Jackson and the defendant, and upon such statement a balance of 176 & $\frac{35}{100}$ dollars was found due to John Jackson from the defendant; which said balance of 176 & $\frac{35}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said John Jackson sold, trans-
24 ferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

32nd Count.

Plaintiff, for a 32nd count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 31st day of March, 1894, at the said county of Yavapai, an account was stated between J. F. Taylor and the defendant, and upon such statement a balance of 90 & $\frac{14}{100}$ dollars was found due to J. F. Taylor from the defendant; which said balance of 90 & $\frac{14}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said J. F. Taylor sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

33rd Count.

Plaintiff, for a 33rd count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 5th day of May, 1894, at the said county of Yavapai, an account was stated between Ed Hartsfield and the defendant, and upon such statement a balance of 118 & $\frac{30}{100}$ dollars was found due to Ed Hartsfield from the defendant; which said balance of 118 & $\frac{30}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Ed Hartsfield sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

34th Count.

Plaintiff, for a 34th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 5th day of May, 1894, at the said
26 county of Yavapai, an account was stated between James Hartsfield and the defendant, and upon such statement a balance of thirty-eight dollars was found due to James Hartsfield from the defendant; which said balance of thirty-eight dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said James Hartsfield sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

36th Count.

Plaintiff, for a 36th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 26th day of April, 1894, at the said county of Yavapai, an account was stated between Jones Perry and the defendant, and upon such statement a balance of 3 & $\frac{70}{100}$ dollars was found due to Jones Perry from the defendant; which said balance of 3 & $\frac{70}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Jones Perry sold, transferred,
and assigned said stated account to this plaintiff, who is now
27 the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

37th Count.

Plaintiff, for a 37th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between George Whiting and the defendant, and upon such statement a balance of 213.80 dollars was found due to George Whiting from the defendant; which said balance of 213.80 dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said George Whiting sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

38th Count.

Plaintiff, for a 38th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint,
28 first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 16th day of June, 1894, at the said county of Yavapai, an account was stated between Bliss & Co., a copartnership composed of Frank Bliss & another, whose name is unknown, and the defendant, and upon such statement a balance of 93.35 dollars was found due to Bliss & Co. from the defendant; which said balance of 93.35 dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Bliss & Co. sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

39th Count.

Plaintiff, for a 39th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 25th day of April, 1894, at the said county of Yavapai, an account was stated between Fred Hickey and the defendant, and upon such statement a balance of 26 & $\frac{95}{100}$ dollars was found due to Fred Hickey from the defendant; which said
29 balance of 26 & $\frac{95}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Fred Hickey sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

40th Count.

Plaintiff, for a 40th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between Thos. Trimbath and the defendant, and upon such statement a balance of 44 dollars was found due to Thos. Trimbath from the defendant; which said balance of 44 dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Thos. Trimbath sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

30 *41st Count.*

Plaintiff, for a 41st count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count to avoid repetition.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between Ed Brizzse and the defendant, and upon such statement a balance of 9 & $\frac{65}{100}$ dollars was found due to Ed Brizzse from the defendant; which said balance of 9 & $\frac{65}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Ec Erizzse sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

42nd Count.

Plaintiff, for a 42nd count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

31 II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between Tom Huckalby and the defendant, and upon such statement a balance of 56 & $\frac{40}{100}$ dollars was found due to Tom Huckalby from the defendant; which said balance of 56 & $\frac{40}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Tom Huckalby sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

43rd Count.

Plaintiff, for a 43rd count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between Henry Koester and the defendant, and upon such statement a balance of 65 & $\frac{75}{100}$ dollars was found due to Henry Koester from the defendant; which said balance of 65 & $\frac{75}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Henry Koester sold, trans-
32 ferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

44th Count.

Plaintiff, for a 44th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 31st day of March, 1894, at the said county of Yavapai, an account was stated between Timothy Dwyer and the defendant, and upon such statement a balance of 17 dollars was found due to Timothy Dwyer from the defendant; which said balance of 17 dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Timothy Dwyer sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

45th Count.

Plaintiff, for a 45th count and separate cause of action against the defendant, alleges:

33 I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 21st day of April, 1894, at the said county of Yavapai, an account was stated between J. E. Evans and the defendant, and upon such statement a balance of 13 & $\frac{90}{100}$ dollars was found due to J. E. Evans from the defendant; which said balance of 13 & $\frac{90}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said J. E. Evans sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

46th Count.

Plaintiff, for a 46th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 26th day of April, 1894, at the said county of Yavapai, an account was stated between A. J. Grice and the defendant, and upon such statement a balance of 43 & $\frac{65}{100}$ dol-
34 lars was found due to A. J. Grice from the defendant; which said balance of 43 & $\frac{65}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said A. J. Grice sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

47th Count.

Plaintiff, for a 47th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between Thos. Burns and the defendant, and upon such statement a balance of 42 & $\frac{70}{100}$ dollars was found due to Thos. Burns from the defendant; which said balance of 42 & $\frac{70}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Thos. Burns sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

35 *48th Count.*

Plaintiff, for a 48th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 25th day of April, 1894, at the said county of Yavapai, an account was stated between Steve Mensinger and the defendant, and upon such statement a balance of 36 & $\frac{50}{100}$ dollars was found due to Steve Mensinger from the defendant; which said balance of 36 & $\frac{50}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Steve Mensinger sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

49th Count.

Plaintiff, for a 49th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

36

II.

That on or about the 30th day of April, 1895, at the said county of Yavapai, an account was stated between Hugh McDermott and the defendant, and upon such statement a balance of 28 & $\frac{90}{100}$ dollars was found due to Hugh McDermott from the defendant; which said balance of 28 & $\frac{90}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Hugh McDermott sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

50th Count.

Plaintiff, for a 50th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetitions.

II.

That on or about the 8th day of May, 1894, at the said county of Yavapai, an account was stated between Ed. O'Brien and the defendant, and upon such statement a balance of 55 & $\frac{45}{100}$ dollars was found due to Ed. O'Brien from the defendant; which said balance of 55 & $\frac{45}{100}$ dollars the defendant then and there agreed to pay.

37

III.

That afterwards, for value, said Ed. O'Brien sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

51st Count.

Plaintiff, for a 51st count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 2nd day of April, 1894, at the said county of Yavapai, an account was stated between Frank Bagley and the defendant, and upon such statement a balance of 40 & $\frac{35}{100}$ dollars was found due to Frank Bagley from the defendant; which said balance of 40 & $\frac{35}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Frank Bagley sold, transferred, and assigned said stated a*m*-ount to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

5nd Count.

Plaintiff, for a 52nd count and separate cause of action
38 against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 26th day of April, 1894, at the said county of Yavapai, an account was stated between Dennis Lawton and the defendant, and upon such statement a balance of 20 dollars was found due to Dennis Lawton from the defendant; which said balance of 20 dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Dennis Lawton sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

53rd Count.

Plaintiff, for a 53rd count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 25th day of May, 1894, at the said county of Yavapai, an account was stated between Jos. Marlin and
39 the defendant, and upon such statement a balance of 133 & $\frac{97}{100}$ dollars was found due to Jos. Marlin from the defendant; which said balance of 133 & $\frac{97}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Jos. Marlin sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

54th Count.

Plaintiff, for a 54th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 8th day of M*ya*, 1894, at the said county of Yavapai, an account was stated between Frank Blandy and the defendant, and upon such statement a balance of 90 & $\frac{14}{100}$ dollars was found due to Frank Blandy from the defendant; which said balance of 90 & $\frac{14}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said Frank Blandy sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof,
40 though often requested so to do.

55th Count.

Plaintiff, for a 55th count and separate cause of action against the defendant, alleges:

I.

That all the allegations of paragraph one of this complaint, first count, are true, and the plaintiff only omits to allege the same separately in this count in order to avoid repetition.

II.

That on or about the 1st day of Aug., 1894, at the said county of Yavapai, an account was stated between George S. Porter, Jr., and the defendant, and upon such statement a balance of 415 & $\frac{86}{100}$ dollars was found due to George S. Porter from the defendant; which said balance of 415 & $\frac{86}{100}$ dollars the defendant then and there agreed to pay.

III.

That afterwards, for value, said George S. Porter, Jr., sold, transferred, and assigned said stated account to this plaintiff, who is now the legal owner and holder thereof.

That defendant has not paid the same or any part thereof, though often requested so to do.

Wherefore plaintiff prays judgement against the defendant:

1st. For the sum of $201.04, with interest from the 5th day of May, 1894.

2nd. For the sum of $27.70, with interest from the 8th day of May, 1894.

41

3.	For the sum of			$37.25	&	interest	from	May 8, 1894.
4.	"	"	"	20.45	"	"	"	March 26, 1894.
5.	"	"	"	9.25	"	"	"	July 18, 1894.
6.	"	"	"	505.15	"	"	"	May 1st, 1894.
7.	"	"	"	178.65	"	"	"	July 2nd, 1894.
8.	"	"	"	40.50	"	"	"	May 8, 1894.
9.	"	"	"	58.05	"	"	"	Ap'l 18, 1894.
10.	"	"	"	55.50	"	"	"	" " "
11.	"	"	"	23.90	"	"	"	May 8, 1894.
12.	"	"	"	70.00	"	"	"	" 15, 1894.
13.	"	"	"	1,626.30	"	"	"	" 20, 1894.
14.	"	"	"	220.59	"	"	"	" 8, 1894.
15.	"	"	"	437.90	"	"	"	" " "
16.	"	"	"	4,266.59	"	"	"	June 19, 1894.
17.	"	"	"	171.00	"	"	"	Aug. 1, 1894.
18.	"	"	"	227.50	"	"	"	June 1, 1894.
19.	"	"	"	239.	"	"	"	" " "
20.	"	"	"	18.88	"	"	"	May 1, 1894.
21.	"	"	"	2.50	"	"	"	M'ch 1, 1894.
22.	"	"	"	25.00	"	"	"	April 1, 1894.
23.	"	"	"	754.35	"	"	"	" 2, 1894.
24.	"	"	"	45.30	"	"	"	" 9, 1894.

25.	"	"	"	"	37.15	"	"	"	M'ch 23, 1894.
26.	"	"	"	"	17.45	"	"	"	May 8, 1894.
27.	"	"	"	"	85.50	"	"	"	" 7, 1894.
28.	"	"	"	"	80.00	"	"	"	July 31, 1894.
29.	"	"	"	"	40.00	"	"	"	May 14, 1894.

42

30th. For the sum of $193.60 & interest from May 7th, 1894.

31st.	"	"	"	"	176.37	"	"	"	Sept. 9, "
32nd.	"	"	"	"	90.14	"	"	"	M'ch 31, "
33rd.	"	"	"	"	118.30	"	"	"	May 5, "
34th.	"	"	"	"	38.	"	"	"	" " "
35th.	"	"	"	"	46.60	"	"	"	" " "
36th.	"	"	"	"	3.70	"	"	"	Ap'l 26, "
37th.	"	"	"	"	213.80	"	"	"	May 8, "
38th.	"	"	"	"	93.32	"	"	"	June 16, "
39th.	"	"	"	"	26.95	"	"	"	Ap'l 25, "
40th.	"	"	"	"	44.	"	"	"	May 8, "
41st.	"	"	"	"	9.65	"	"	"	" " "
42nd.	"	"	"	"	56.40	"	"	"	" " "
43rd.	"	"	"	"	65.75	"	"	"	" " "
44th.	"	"	"	"	17.00	"	"	"	M'ch 31, "
45th.	"	"	"	"	13.90	"	"	"	Ap'l 21, "
46th.	"	"	"	"	43.65	"	"	"	" 26, "
47th.	"	"	"	"	42.70	"	"	"	May 8, "
48th.	"	"	"	"	36.50	"	"	"	A'pl 25, "
49th.	"	"	"	"	28.90	"	"	"	" 30, "
50th.	"	"	"	"	55.45	"	"	"	May 8, "
51st.	"	"	"	"	40.35	"	"	"	Ap'l 2, "
52nd.	"	"	"	"	20.00	"	"	"	" 26, "
53rd.	"	"	"	"	133.97	"	"	"	May 25, "
54th.	"	"	"	"	90.14	"	"	"	" 8, "
55th.	"	"	"	"	415.86	"	"	"	Aug. 1, "

56th. And for costs & disbursements in this behalf in-
43 curred & expended.

R. E. MORRISON &
HERNDON & NORRIS,
Att'ys for Pl'ff.

On which is the following endorsement, to wit:
No. 2344. 4th dist. court, Yavapai Co., A. T. Jas. I. Gardner *vs.* Henrietta M. & M. Co. Complaint. Filed Dec. 4, 1894, at 6 o'clock p. m. A. J. Herndon, clerk.

44 And thereafter, to wit, on the 24th day of December, 1894, the following affidavit for attachment was issued, to wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

JAMES I. GARDNER, Plaintiff,
vs.
HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant.

TERRITORY OF ARIZONA, *County of Yavapai*, } ss:

James I. Gardnêr, being first duly sworn, upon his oath says that he is the plaintiff in the above-entitled action and makes this affidavit for the purpose of procuring an attachment in said case against the property of the defendant, The Henrietta Mining & Milling Company, a corporation.

That defendant is indebted to plaintiff in the sum of eleven thousand six hundred and thirty & $\frac{46}{100}$ dollars upon fifty-five express contracts for the direct payment of money; that such contracts were made and are payable in this Territory of Arizona, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property or any pledge of per-
45 sonal property.

That the character of said indebtedness is as follows:

1st. A stated account of $201.04, dated May 5th, 1894, between plaintiff and defendant.

2nd. Fifty-four stated accounts between defendant and 54 different parties, who have each assigned their respective claims to pl'ff for work & labor & supplies, as fully set out in the complaint, each account being separately set for & in a separate count in said complaint, aggregating the sum of eleven thousand four hundred and twenty-nine & $\frac{42}{100}$ dollars.

That the total of all said indebtedness amounts to the said sum of eleven thousand six hundred and thirty & $\frac{46}{100}$ dollars; that the same is due to plaintiff over and above all legal set-offs and counterclaims, and that demand has been made for the payment of said amount due.

That the attachment is not sought for wrongful or malicious purpose & the action is not prosecuted to hinder or delay any creditor of the defendant.

(Signed) J. I. GARDNER.

Subscribed and sworn to before me this 24th day of December, A. D. 1894.

(Signed) J. C. HERNDON,
[SEAL.] *Notary Public.*

(Upon which is the following endorsement, to wit:)

46 No. 2344. 4th dist. court, Yavapai county, A. T. James I. Gardner *vs.* Henrietta M. & M. Co. Aff'd't in attachment. Filed Dec. 24, 1894, at 6 o'clock p. m. A. J. Herndon, clerk.

47 And thereupon, on said 24th day of December, 1894, the following bond was approved and filed, to wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

JAMES I. GARDNER, Plaintiff,
vs.
HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant.
} Bond for Attachment.

THE TERRITORY OF ARIZONA,
County of Yavapai, } ss:

We, the undersigned, James I. Gardner, as principal, and W. T. Brown and A. F. Swigert, as sureties, acknowledge ourselves bound to pay to Henrietta Mining & Milling Company, a corporation, the sum of eleven thousand six hundred & thirty & $\frac{50}{100}$ dollars, conditioned that the above-bound James I. Gardner, plaintiff in attachment against the said Henrietta Mining & Milling Company, a corporation, defendant, will prosecute his said suit to effect, and that he will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment.

Witness our hands this 24th day of December, A. D. 1894.

(Signed) JAS. I. GARDNER.
W. T. BROWN.
A. F. SWIGERT.

48 On which is the following endorsement, to wit:

No. 2344. 4th dist. court, Yavapai county, A. T. James I. Gardner *vs.* Henrietta M. & M. Co. Bond in attachment. Approved and filed Dec. 24, 1894, at 6 o'clock p. m. A. J. Herndon, clerk.

And on said 24th day of December, 1894, the following writ of attachment was issued, to wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona, County of Yavapai.

JAMES I. GARDNER, Plaintiff,
vs.
HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant.
} No. 2344.

The Territory of Arizona to the sheriff or any constable of
49 Yavapai county, Greeting:

We command you that you attach forthwith so much of the property of Henrietta Mining & Milling Company, a corporation, if to be found in you- county, as shall be of value sufficient to make the sum of eleven thousand six hundred & thirty & $\frac{46}{100}$ ($11,630.46) dollars and the probable costs of suit, to satisfy the demand of James

I. Gardner, plaintiff above named, and that you keep and secure in your hands the property so attached, unless replevined, that the same may be liable to further proceedings thereon to be had before the court, and that you make return of this writ, showing how you have executed the same.

Witness my hand and the seal of the district court this 24 day of Dec., A. D. 1894.

[SEAL.] (Signed) A. J. HERNDON, *Clerk.*

And upon which is the following endorsement:

No. 2344. In the district court of the fourth judicial district, Yavapai county, Arizona. Jas. I. Gardner *vs.* Henrietta M. & M. Co. Attachment. Filed Dec. 31, 1894, at 4 o'clock p. m. A. J. Herndon, clerk. Received Dec. 24t-, 1894, at 6 p. m. J. R. Lowry, sheriff, by H. H. Cartter, dep.

50 And on which is endorsed the following return, to wit:

TERRITORY OF ARIZONA, } *ss:*
County of Yavapai, }

I hereby certify that under and by virtue of the annexed writ of attachment, on the 26th day of December, 1894, I levied upon and attached all the right, title, and interest of the defendant, Henrietta Mining and Milling Company, a corporation, of, in, and to the following-described real estate, viz:

The mine or mining claim known as the "American Flag," notice of location whereof is recorded in the office of the county recorder of said Yavapai county, in Book 34 of Mines, at page 425, to which said location notice reference is hereby made for a more particularity of description.

The mine or mining claim known as the "Invincible," notice of location whereof is recorded in Book 36 of Mines, at page 336, in the office of the county recorder of said county of Yavapai, to which said notice of location reference is hereby made for more particularity of description.

The mine or mining claim known as the "Yankee Girl," notice of location whereof is recorded in the office of the county recorder of said county of Yavapai, in Book 34 of Mines, at pages 418, 419, to which said location notice and the record thereof reference is hereby made for more particularity of description.

The mine or mining claim known as the "Silverton," notice of location whereof is recorded in the office of the county recorder of said county of Yavapai, in Book 32 of Mines, at page 106, to which said location notice and the record thereof reference is hereby

51 made for more particularity of description.

The "Trinity" mine or mining claim, the notice of location whereof is recorded in the office of the county recorder of said Yavapai county, in Book 34 of Mines, at page 378, and is situate about one mile in a westerly direction from the Big Bug post-office, and being the first south extension of the American Flag mine, to which said notice of location and the record thereof reference is hereby made for more particularity of description.

The mine or mining claim known as the "Germania," notice of location whereof is recorded in the office of the county recorder of said county of Yavapai, in Book 38 of Mines, at pages 2 and 6, to which said location notice and the record thereof reference is hereby made for more particularity of description.

The Henrietta mill site, the notice of location whereof is of record in Book 3 of Mill Sites, at page 358, records of Yavapai county, and to which said records reference is hereby made for more particularity of description.

Also the twenty-stamp quartz mill, together with the engine, boiler, shafting, belts and belting, fixtures, stamps, dies, pipe and the pipe line connecting said mill and the steam pump on Big Bug creek, and all other machinery and appurtenances and appliances connected with and appertaining to said quartz mill, and the buildings enclosing the same, all situate on, in, and upon the Trinity mining claim, and being a part of the same.

Also one steam pump, with the boiler, engine pump, pipes, belts, fixtures, and other machinery, situate on the Henrietta mill site, and being a part thereof, and also the buildings enclosing the
52 said machinery and situate on said mill site.

Also the steam hoist, with the engine, boiler, drum, cable, buckets, and all other appliances, appurtenances, and machinery connected therewith, and the buildings enclosing the same, and situate on the above-described mining claims.

Also the tramway, car track, and the cable connected therewith, extending from the steam hoist to the said quartz mill, and situate on and being attached to the above mines, mining claims, and mill site.

All of the above-described property being situate in Big Bug mining district, county of Yavapai, Territory of Arizona, by filing in the office of the county recorder of Yavapai county a copy of the writ of attachment in this cause, with the endorsement of levy therein.

Prescott, A. T., Dec. 26th, 1894.

J. R. LOWRY, *Sheriff*,
By H. H. CARTTER, *Under Sheriff*.

53 And on the 26th day of December, 1894, the following affidavit of non-residence was filed, to wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

JAMES I. GARDNER, Plaintiff,
vs.
THE HENRIETTA MINING AND MILLING COMPANY, a Corporation, Defendants.

TERRITORY OF ARIZONA, *County of Yavapai*, } ss:

James I. Gardner, being first duly sworn, deposes and says—

That he is the plaintiff in the above-entitled action *action*; that

the defendant is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and doing business and owning property in the said county of Yavapai, Territory aforesaid, but has no legally appointed and constituted agent in this Territory.

That he is informed and believes, and upon such information and belief states the fact to be, that the principal office of the said corporation is in the city of Chicago, State of Illinois, and as to a more definite address of said defendant in said city he is not advised.

(Signed) JAMES I. GARDNER.

54 Subscribed and sworn to before me this 26th day of December, 1894.

(Signed) J. E. MORRISON,

[SEAL.] *Notary Public.*

Upon which is the following endorsement, to wit:

No. 2344. District court, Yavapai Co., Arizona Ty. J. I. Gardner *vs.* Henrietta M. & M. Co. Affidavit of non-residences. Filed Dec. 26th, 1894, at 10 o'clock a. m. A. J. Herndon, clerk.

55 In the District Court of the Fourth Judicial District, Territory of Arizona, County of Yavapai.

JAMES I. GARDNER, Plaintiff,
vs.
HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant. } Summons. No. 2344.

Action brought in the district court of the fourth judicial district in and for the county of Yavapai, Territory of Arizona.

The Territory of Arizona sends greeting to Henrietta Mining and Milling Company, a corporation:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the fourth judicial district in and for the county of Yavapai, in the Territory of Arizona, and answer the complaint filed with the clerk of this court, at Prescott, in said county (a copy of which complaint accompanies this summons), within ten days (exclusive of the day of service) after the service upon you of this summons, if served in this county; but if served out of the county and within the district, then within twenty days; where personal service of a copy of this summons and complaint is made out of the Territory or service by publication is made, as provided by law, within twenty days after the completion thereof; in all other cases thirty days.

56 And you are hereby notified that if you fail to appear and answer the complaint as above required, the plaintiff will take judgment by default against you, and judgment for costs and disbursements in this behalf expended.

Given under my hand and the seal of said court, at Prescott, this 26th day of Dec., A. D. 1894.

A. J. HERNDON, *Clerk.*

MORRISON, HERNDON & NORRIS,
Attorney- for Plaintiff.

Upon which is the following return:

Office of the sheriff of Yavapai county.

I hereby certify that I received the within summons on the 28th day of December, 1894, and personally served the same on the defendants by causing *it* to be published once a week for four weekss in the Prescott Courier, a newspaper published at Prescott, Yavapai county, Arizona, as follows, January 4th, January 11th, January 18th, and January 25th, 1895, a true copy of the complaint in the action named in said summons, attached to said summons. A copy of said summons is hereto attached and made part of this return.

Dates this 25th day of February, 1895.

G. C. RUFFNER, *Sheriff,*
By J. P. DILLON, *Deputy.*

And thereafter, on the 26th day of December, 1894, the following publication of summons and affidavit verifying the same was filed, to wit:

57 *Summons.*

In the District Court of the Fourth Judicial District, Territory of Arizona, County of Yavapai.

JAMES I. GARDNER, Plaintiff,
versus
HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant. } Summons. No. 2344.

Action brought in the district court of the fourth judicial district in and for the county of Yavapai, Territory of Arizona.

The Territory of Arizona sen-s greeting to Henrietta Mining and Milling Company, a corporation:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the fourth judicial district in and for the county of Yavapai, in the Territory of Arizona, and answer the complaint filed with the clerk of this court, at Prescott, in said county (a copy of which complaint accompanies this summons), within ten days (exclusive of the day of service) after the service upon you of this summons, if served in the county, but if served out *og yhe* sount and within the district, then within twenty days; where personal service of a copy of this summons and complaint is made out of the Territory or service by publication is made as provided by law,

within twenty days after the completion thereof; in all other cases thirty days.

And you are hereby notified that if you fail to appear and *and* answer the complaint as above required, the plaintiff will
58 take judgment by default against you, and judgment for costs and disbursements in this behalf expended.

[SEAL.] Given under my hand and the seal of said court, at Prescott, this 26th day of Dec., A. D. 1894.

A. J. HERNDON, *Clerk.*

MORRISON, HERNDON & NORRIS,
Attorneys for Plaintiff.

59 And thereafter, to wit, on the 2nd day of April, 1895, the following default was filed, to wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

JAMES I. GARDNER, Plaintiff,
vs.
HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant. } No. 2344.

Default.

In this action the defendant, The Henrietta Mining & Milling Company, a corporation, having been regularly served with summons, and the legal time for answering having expired, and the said defendant having wholly failed to appear and answer the complaint of plaintiff filed herein, the default of said defendant, The Henrietta Mining & Milling Company, a corporation, for want of answer to the premises, is hereby duly entered according to law.

Attest my hand and the seal of said court affixed this 2nd day of April, 1895.

A. J. HERNDON,
[SEAL.] *Clerk District Court.*

60 And thereafter, on the 4th day of April, 1895, the following judgment was rendered by the court and filed, to wit:

In the District Court of the Fourth Judicial District in the Territory of Arizona in and for the County of Yavapai.

JAMES I. GARDNER, Plaintiff,
vs.
THE HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant. } Judgment.

This cause came on for hearing this second day of April, 1895, being a day of the regular November term, 1894, of said court, said term having been continued from day to day and from time to time, to and including the said second day of April, 1895.

The defendant was duly and regularly served with process herein and an attachment was duly and regularly levied upon its property in said county of Yavapai.

That said defendant failed to appear and answer said complaint or plead thereto in any way, and the legal time for answering having expired, on motion of Herndon & Norris, attorneys for plaintiff, it is ordered that the default of said defendant be entered in open court, which is accordingly done.

Thereafter, on the same day, in open court, upon motion of R. E. Morrison, Esqr., and Her-don & Norris, attorneys for plaintiff,
61 the court proceeded to take the proofs in said cause and to try the same.

James I. Gardner, plaintiff, was sworn as a witness in his own behalf, and documentary evidence introduced, and, the evidence being closed, the court finds that the plaintiff is entitled to recover on each count in said complaint, as follows:

On the 1st count	$213.94
" 2nd "	29.45
" 3rd "	39.65
" 4th "	21.90
" 5th "	9.70
" 6th "	535.57
" 7th "	188.00
" 8th "	42.10
" 9th "	62.05
" 10th "	59.25
" 11th "	25.55
" 12th "	74.30
" 13th "	1,730.68
" 14th "	234.74
" 15th "	466.00
" 16th "	4,503.02
" 17th "	178.93
" 18th "	240.76
" 19th "	252.93
" 20th "	20.10
" 21st "	2.65
" 22nd "	26.75

62

On the 23rd count	810.35
" 24th "	38.45
" 25th "	39.65
" 26th "	17.59
" 27th "	90.98
" 28th "	83.76
" 29th "	42.55
" 30th "	206.02
" 31st "	183.33
" 32nd "	96.44
" 33rd "	125.89

"	34th "	40.44
"	35th "	49.60
"	36th "	3.94
"	37th "	227.52
"	38th "	98.52
"	39th "	28.76
"	40th "	46.83
"	41st "	10.18
"	42nd "	60.02
"	43rd "	69.97
"	44th "	18.10
"	45th "	14.85
"	46th "	46.65
"	47th "	45.65
"	48th "	39.00
"	48th "	30.90

63

On the 50th count	59.25
" 51st "	43.15
" 52nd "	21.35
" 53rd "	142.97
" 54th "	96.14
" 55th "	435.26
Making a total of	$12,332.08

Wherefore, by virtue of the law and by reason of the premises, it is ordered, adjudged, and decreed that plaintiff, James I. Gardner, do have and recover of and from the defendant, The Henrietta Mining & Milling Company, a corporation, the sum of $12,332.08, and that said sum bear interest from this date, at the rate of seven per cent. per annum, until paid, and that plaintiff do have and recover of the defendant his costs in this behalf incurred and expended, taxed at the sum of $23.95.

And it appearing to the court that a writ of attachment heretofore issued in this cause was, on the 26th day of Dec., 1894, by the sheriff of Yavapai county, Arizona, levied upon the following-described property of the defendant, to wit, all the right, title, and interest of the defendant, Henrietta Mining and Milling Company, a corporation, of, in, and to the following-described real estate, viz., the mine or mining claim known as the American Flag, notice of location whereof is recorded in the office of the county recorder of said Yavapai county, in Book 34 of Mines, at page 425, to which said location notice reference is hereby made for a more particularity of description.

64 The mine or mining claim known as the Invincible, notice of location whereof is recorded in Book 36 of Mines, at page 336, in the office of the county recorder of said county of Yavapai, to which said notice of location reference is hereby made for a more particular description.

The mine or mining claim known as the Yankee Girl, the notice of location whereof is recorded in the office of the county recorder of said Yavapai county, in Book 34 of Mines, at pages 418, 419, to which said location notice and the record thereof reference is hereby made for more particularity of description.

The mine or mining claim known as the Silverton, notice of location whereof is recorded in the office of the county recorder of said county of Yavapai, in Book 32 of Mines, at page 106, to which said location notice and the record thereof reference is hereby made for more particularity of description.

The Trinity mine or mining claim, the notice of location whereof is recorded in the office of the county recorder of said Yavapai county, in Book 34 of Mines, at page 378, and is situated about 1 mile in a westerly direction from the Big Bug post-office, and being the first south extension of the American Flag mine, to which said notice of location and the record thereof reference is hereby made for particularity of description.

The mine or mining claim known as the Germania, notice of location whereof is recorded in the office of the county recorder of said county of Yavapai, in Book 38 of Mines, at pages 2 and 6, to which said location notice and the record thereof reference is hereby made for more particularity of description.

65 The Henrietta mill site, the notice of location whereof is of record in Book 3 of Mill Sites, at page 358, records of Yavapai county, and to which said records reference is hereby made for more particular description.

Also the twenty-stamp quartz mill, together with the engine, boiler, shafting, belts and belting, fixtures, stamps, dies, pipe, and the pipe line connectiong said mill and the steam pump on Big Bug creek, and all other machinery and appurtenances and appliances connected with and appurtaining to said quartz mill and the buildings enclosing the same, all situate in, on, and upon the Trinity mining claim and being a part of the same.

Also one steam pump, with the boiler, engine, pump, pipes, belts, fixtures, and other machinery, situate on the Henrietta mill site and being a part thereof, and also the buildings enclosing the said machinery and situate on said mill site.

Also the steam hoist, with the engine, boiler, drum, cable bucket/s, and all other appliances, appurtenances, and machinery connected therewith, and the buildings enclosing the same and situate on the above-described mining claims.

Also the tramway, car track, and the cable connected therewith, extending from the steam hoist to the said quartz mill, and situate on and being attached to the above mines, mining claims, and mill sites, all of the above-described property being situate in Big Bug mining district, county of Yavapai, Territory of Arizona.

It is therefore order-, adjudged, and decreed that said attachment lien, as it existed on the 26th day of December, 1894, be, and the same is, foreclosed, and that an order of sale be issued com-

66 manding the sale of said property or so much thereof as may be necessary for the satisfaction of this judgment.

Done in open court this second day of April, 1895.
(Signed) J. B. BETHUNE,
District Judge.

Upon which is the following endorsement, to wit:
No. 2344. James I. Gardner, plaintiff, *vs.* Henrietta Mining & Milling Co., a corporation, defendant. Judgment. Filed April 4th, 1895, at 2 o'clock p. m. A. J. Herndon, clerk, by Wm. Wilkerson, deputy. Ent. B. 5, page 101; doc. B. 2, page 55.

67 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

JAMES I. GARDNER, Plaintiff,
vs.
HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant. } No. 2344.

Certificate to Judgment-roll.

TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

I, A. J. Herndon, clerk of the district court of the fourth judicial district of the Territory of Arizona in and for the county of Yavapai, do hereby certify the above and foregoing to be a full, true, and correct copy of the judgment entered in the above numbered and entitled cause as recorded in Judgment Book No. 5 of said court, at page 101 *et seq.*; and I further certify that the foregoing papers, hereto attached, do constitute the judgment-roll in said action.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 4 day of April, A. D. 1895.
(Signed) A. J. HERNDON,
[SEAL.] *Clerk District Court.*

68 And thereafter, on the 28th of Dec., 1895, the following petition for writ of error was filed, to wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for Yavapai County.

J. I. GARDNER, Plaintiff, and to the Clerk of said Court,
vs.
HENRIETTA MINING AND MILLING COMPANY, a Corporation, Defendant.

And now comes the said defendant company, by its attorney, J. F. Wilson, and alleges that the plaintiff, J. I. Gardner, is the party adversely interested to said company, the petitioner herein, and that plaintiff resides in the city of Prescott, Yavapai county, Territory of Arizona; that in said court and on the 2nd day of April, 1895, a certain judgement was rendered and a decree of fore-

closure of mechanics' lien on the property therein described was made and entered of record in said court for the sum of $12,332.08, together with legal interest thereon and costs of suit, as appears by the judgment-roll of said cause.

And the said defendant, desiring to prosecute a writ of error from said judgment to the supreme court of the Territory of Arizona, and desiring to remove the said cause to said supreme court for revision and correction, now and hereby petitions for a writ of error according to law.

Defendant also alleges that the said Henrietta Mining & 69 Smelting Company is a corporation organized under and by virtue of the laws of the State of Illinois, with its principal office at the city of Chicago, Cook county, in said State.

HENRIETTA MINING & MILLING COMPANY,
By J. F. WILSON, *Its Attorney-in-fact.*

J. F. WILSON,
Attorney for Petitioner in Error.

Upon which is the following endorsement:

No. 2344. J. I. Gardner *vs.* Henrietta Mining and Milling Co. Petition for writ of error. Filed Dec. 28th, 1895, at 4 o'clock p. m. A. J. Herndon, clerk, by Wm. Wilkerson, deputy. J. F. Wilson, attorney for petitioner in error.

70 And on the same day the following appeal bond was filed, to wit:

In the District Court of the Fourth Judicial Dsitrcit of the Territory of Arizona in and for Yavapai County.

J. I. GARDNER, Defendant in Error,
vs.
HENRIETTA MINING & MILLING COMPANY, a Corporation, Plaintiff in Error.
} Cost Bond on Writ of Error.

Whereas in the above-entitled cause, pending in the district court of the fourth judicial district of the Territory of Arizona in and for Yavapai county, and at a regular term of said court, to wit, on the 2nd day of April, 1895, the said J. I. Gar-ner recovered judgment against the said Henrietta Mining & Milling Company, a corporation, for the sum of twelve thousand three hundred thirty-two and $\frac{8}{100}$ dollars, with interest thereon from the — day of ——, 1895, at 7 per cent. per annum, and all costs of suit; from which judgement the said Henrietta Mining & Milling Company, a corporation, has sued out a writ of error to our supreme court:

Now, therefore, we, Henrietta Mining & Milling Company, a corporation, as princiapl, and William H. Barnes and John H. Martin and —— and ——, as sureties, acknowledge ourselves bound to pay to J. I. Gardner the sum of five hundred dollars, conditioner that the said Henrietta Mining & Milling Company, a corporation, plain-

tiff in error, shall prosecute *his* writ of error with effect and
71 shall pay all the costs which have accrued in the court below or which may accrue in the appellate court.

Witness our hands this 27th day of December, A. D. 1895.

(Signed) HENRIETTA MINING & MILLING CO.,
[SEAL.] By GEORGE W. HENRY, *Pres't.*
(Signed) GEORGE W. HENRY.
(Signed) WILLIAM H. BARNES, *Sec'y.*
(Signed) JOHN H. MARTIN.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

William H. Barnes and John H. Martin, being severally duly sworn, each for himself on oath deposes and says that he is a resident and freeholder or householder within the Territory of Arizona; that he is at least worth the amount for which he has become surety on the foregoing bond over and above his just debts and liabilities and exclusive of property exempt from execution.

(Signed) WILLIAM H. BARNES.
(Signed) JOHN H. MARTIN.

Subscribed and sworn to before me this 26th day of December, A. D. 1895.

(Signed) H. D. UNDERWOOD,
[SEAL.] *Notary Public.*

I have fixed the probable amount of the costs of the suit of both the appellate court and the court below at two hundred and fifty dollars, and approve the foregoing bond this 28th day of
72 December, A. D. 1895.

A. J. HERNDON,
Clerk of the District Court, 4th Judicial District, Yavapai County, Arizona,
By WM. WILKERSON, *Deputy.*

Upon which is the following endorsement, to wit:

No. 2344. In the district court, 4th judicial district, Yavapai county, Arizona. J. I. Gardner, d'f't in error, *vs.* Henrietta Mining & Milling Co., a corporation, pl't'ff in error. Cost bond on writ of error. Approved and filed Dec. 28th, 1895, at 4 o'clock p. m. A. J. Herndon, clerk, by Wm. Wilkerson, deputy.

73 And on the same day the following supersedeas bond was filed, to wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for Yavapai County.

J. I. GARDNER, Plaintiff and Defendant in Error,
vs.
HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant and Plaintiff in Error.
} Supersedeas Bond.

Whereas, in the above-entitled cause, pending in the district court of the fourth judicial district of the Territory of Arizona in and for Yavapai county, and at a regular term thereof, to wit, on the 2nd day of April, A. D. 1895, the said J. I. Gardner, plaintiff, recovered a judgment against the said Henrietta Mining & Milling Company, a corporation, for the sum of $12,332.08, with interest thereon from the 2nd day of April, 1895, at 7 per cent. per annum, and all costs of suit, from which judgment the said Henrietta Mining & Milling Company, a corporation, has sued out a writ of error to our supreme court and desires to suspend the execution of said judgment during the pendency of said writ of error:

Now, therefore, we, Henrietta Mining & Milling Company, a corporation, as principal, and William H. Barnes and Henry D. Underwood and M. G. Samaniego and Pedro Chareaulou, as sureties, acknowledge ourselves bound to pay to J. I. Gardner the sum
74 of twenty-six thousand dollars, conditioned that the said Henrietta Mining & Milling Company, a corporation, shall prosecute its writ of error with effect, and in case the judgment of the appellate court shall be against it that it shall perform its sentence, judgment, or decree and pay all such damages as said court may award against it.

Witness our hands this 27th day of December, A. D. 1895.

(Signed) HENRIETTA MINING & MILLING CO.,
By GEORGE W. HENRY, *President.*

GEORGE W. HENRY, *Sec'y.*

[SEAL.] (Signed) WILLIAM H. BARNES.
(Signed) HENRY D. UNDERWOOD.
(Signed) M. G. SAMANIEGO.
(Signed) PEDRO CHAREAULOU.

TERRITORY OF ARIZONA, *County of Pima,* } ss:

William H. Barnes, Henry D. Underwood, M. G. Samaniego, Pedro Charalon, the sureties in the foregoing bond named, being severally duly sworn, each for himself *on each* depose and say that he is a resident and freeholder or householder within the Territory of Arizona; that he is at least worth the amount for which he has

become surety on said bond over and above his just debts and liabilities and exclusive of property exempt from execution.

(Signed) WILLIAM H. BARNES.
(Signed) HENRY D. UNDERWOOD.
(Signed) M. G. SAMANIEGO.
(Signed) PEDRO CHAREAULOU.

Subscribed and sworn to before me this 27th day of December, A. D. 1895.

(Signed) JOHN H. MARTIN,
[SEAL.] *Notary Public, Pima Co., Ariz.*

75 Upon which is the following endorsement, to wit:

No. 2344. In the district court, 4th judicial district, Yavapai county, Arizona. J. I. Gardner, plaintiff, d'f't in error, *vs.* Henrietta Mining & Milling Company, a corporation, defendant, pl't'ff in error. Supersedeas bond on writ of error. Approved and filed Dec. 28th, 1895, at 4 o'clock p. m. A. J. Herndon, clerk, by Wm. Wilkerson, deputy. J. F. Wilson, Prescott, A. T.

76 And on the 30th day of December, 1895, the following citation in error was issued, to wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for Yavapai County.

HENRIETTA MINING & MILLING COMPANY, a Corporation, Plaintiff in Error,
vs.
J. I. GARDNER, Defendant in Error.

The Territory of Arizona to J. I. Gardner:

You are hereby commanded to appear before our supreme court at the next term thereof, to be holden in the city of Phœnix, Arizona, on the 13th day of January, A. D. 1896, and then and there defend a writ of error and supersedeas granted on the petition of Henrietta Mining & Milling Company, a corporation (organized under and by virtue of the laws of the State of Illinois, with its principal office at the city of Chicago, county of Cook, in said State), plaintiff there-, against J. I. Gardner (a resident of Yavapai county, Arizona), defendant therein, filed in this court on the 28th day of December, 1895, for the revision and correction of a certain judgement of the sum of $12,332.08, with legal interest thereon, and costs of suit rendered in the district court of the fourth judicial district of the Territory of Arizona in and for Yavapai county on the 2nd day of

77 April, A. D. 1895, in a certain cause pending in said court numbered — on the docket of said court, wherein J. I. Gardner is plaintiff and Henrietta Mining & Milling Company, a corporation, is defendant.

Issued this 30th day of December, A. D. 1895.

Given under my hand and the seal of said court, at office, in Pres-

cott, Yavapai county, Arizona, this — day of December, A. D. 1895.

[SEAL.] A. J. HERNDON,
Clerk of the District Court of the Fourth Judicial District of the Territory of Arizona in and for Yavapai County,
By WM. WILKERSONS, *Deputy.*

OFFICE OF THE SHERIFF OF YAVAPAI COUNTY, *ss:*

I hereby certify that I have delivered a copy of the within writ on the within-named J. I. Gardner, at Prescott, on the 30th day of December, 1895.

G. C. RUFFNER, *Sheriff,*
By J. P. DILLON, *Under Sheriff.*

Upon which is the following endorsement, to wit:

No. 2344. In the district court, 4th judicial district, Yavapai county, Arizona. J. I. Gardner, defendant in error, plaintiff.
78 *vs.* Henrietta Mining & Milling Company, a corporation, defendant & pl't'ff in error. Citation in error. Filed Jan'y 2nd, 1896, at 10 o'clock a. m. A. J. Herndon, clerk; Wm. Wilkerson, deputy. Received Dec. 30th, 1895, at 9.50 a. m. G. C. Ruffner, sheriff, by J. P. Dillon, under sheriff.

79 And on same day the following certificate granting writ of error was filed, to wit:

In the District Court of Yavapai County, Territory of Arizona.

JAMES I. GARDNER, Plaintiff,
vs.
HENRIETTA MINING & MILLING CO., Defendant. } Supersedeas.

I, A. J. Herndon, clerk of the above-named court, hereby certify that a writ of error has been granted to the supreme court of the Territory of Arizona from the judgement rendered by this court on the 2nd day of April, 1895, for the sum of $12,332.08, with legal interest thereon and cost of suit, in favor of the said James I. Gardner and against the said Henrietta Mining & Milling Co., and that petition and supersedeas bond have been executed and filed for said writ as required by law and within the time allowed by law therefor since the rendition of said judgement.

Therefore the said James I. Gardner, the sheriff of said county of Yavapai, and all others, are hereby commanded to stay all proceedings on and under said judgement and to cause the execution heretofore issued on said judgement to be returned unexecuted.

Witness my hand and the seal of said court this December 30th, 1895.

[SEAL.] A. J. HERNDON, *Clerk,*
By WM. WILKERSON, *Deputy.*

80 Upon which is endorsed the following return, to wit:

OFFICE OF THE SHERIFF OF YAVAPAI COUNTY, *ss:*

I hereby certify that I have served the within notice by delivering to the — named J. I. Gardner a copy of same at Prescott on the 30th day of December, 1895.

G. C. RUFFNER, *Sheriff,*
By J. P. DILLON,
Under Sheriff.

And which is also endorsed as follows, to wit:

No. 2344. J. I. Gardner *vs.* Henrietta M. & M. Co. Supersedeas. Certificate that writ of error granted. Filed Jan'y 2nd, 1896, at 2 o'clock p. m. A. J. Herndon, clerk, by Wm. Wilkerson, deputy. Received Dec. 30th, 1895, at 9.50 a. m. G. C. Ruffner, sheriff, by J. P. Dillon, under sheriff.

81 And on the 2nd day of January, 1896, the following notice excepting to sufficiency of supersedeas bond was filed, to wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

J. I. GARDNER, Plaintiff and Defendant in Error,
vs.
HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant and Plaintiff in Error.

To the Henrietta Mining & Milling Company, a corporation, the above-named defendant and plaintiff in error, and to J. F. Wilson, its attorney of record, and to A. J. Herndon, clerk of the above-entitled court.

GENTLEMEN: You and each of you are hereby notified that the above-named plaintiff and defendant in error except to the sufficiency of the sureties on the supersedeas bond in this case, approved and filed by the above-named clerk of this court on the 28th day of Dec., 1895, for the reason that William H. Barnes, Henry D. Underwood, M. G. Samaniego, and Pedro Charouleau, said sureties, are not worth the sum of twenty-six thousand dollars, either jointly or separately, over and above the amount of their just debts and liabilities exclusive of property exempt from execution; that each of

82 said sureties is insolvent, nor is any one of them worth the said sum of twenty-six thousand dollars, the penalty of said bond, nor any amount over and above his just debts and liabilities exclusive of property exempt from execution.

And you are further notified that this notice is given you and each of you under the provisions of paragraph 868, section 220, chapter 20, title XV, of the Revised Statutes of Arizona.

Dated at Prescott, Arizona, this 2nd day of Jan., 1896.

J. I. GARDNER,
Plaintiff & Defendant in Error,
By HERNDON & NORRIS &
R. E. MORRISON, *His Att'ys.*

Upon which is the following endorsement, to wit:

No. 2344. 4th dist. court, Yavapai Co., A. T. J. I. Gardner *vs.* Henrietta M. & M. Co. Notice excepting to sufficiency of supersedeas bond. Service admitted and receipt of copy acknowledged this Jan'y 2, '96. J. F. Wilson, att'y for def't and pl't'ff in error.

83 Filed Jan'y 2nd, 1896, at 2 o'clock p. m. A. J. Herndon, clerk, by Wm. Wilkerson, deputy.

84 And on January 7th, 1896, the following amended petition for writ of error was filed, to wit:

In the District Court of Yavapai County, Territory of Arizona, and to the Clerk of said Court.

J. I. GARDNER, Plaintiff,
vs.
HENRIETTA MINING AND MILLING —, Defendant.
} Amended Petition for Writ of Error.

Now comes the above-named defendant, The Henrietta Mining and Milling Co., by its attorney, and alleges that the said plaintiff is the party adversely interested to the defendant herein, the said Co. and petitioner herein, and that he resides in the city of Prescott, Yavapai county, Territory of Arizona.

That in said court and on the 2nd day of April, 1895, a certain judgment was rendered against this defendant and petitioner herein and in favor of the said plaintiff, J. I. Gardner, on constructive service and without personal service, for the sum of $12,332.08 and an auxiliary decree decreeing the foreclosure of a so-called attachment lien in said cause, together with cost and legal interest in and on said judgment so rendered.

And defendant, desiring to prosecute a writ of error from said judgment to the supreme court of the Territory of Arizona and desiring to remove the said cause *ot* said supreme court for revision and correction, now, and hereby, petitions for writ of error, as the law provides it may.

85 Defendant alleges that the said Henrietta Mining & Milling Co. is a corporation organized and existing by virtue of the laws of the State of Illinois, with its principal office in the city of Chicago, Illinois.

That this amended petition is intended to take the place of the petition filed in the above cause on the 28th day of December, 1895, in which the said judgment referred to was mistakenly named as a judgement foreclosing mechanics' lien instead of the judgement really rendered and herein correctly referred to.

HENRIETTA MINING & MILLING CO.,
By J. F. WILSON, *Attorney-in-fact.*

J. F. WILSON,
Attorney for Petitioner.

Upon which is the following endorsement, to wit:

No. 2344. J. I. Gardner, pl't'ff & d'f't in error, *vs.* Henrietta M.

& M. Co., d'f't & plaintiff in error. Amended petition for writ of error. Filed Jan'y 7th, 1896, at 11.15 o'clock a. m. A. J. Herndon, clerk, by Wm. Wilkerson, deputy. (Signed) J. F. Wilson, attorney for petitioner in error. Prescott, Arizona, January 7, 1896. Copy of the within amended petition for writ of error this day received and further service waived. (Signed) Herndon & Norris, attorneys for J. I. Gardner, pl'ff & defendant in error.

86 And on same day the following additional supersedeas bond was filed, to wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for Yavapai County.

J. I. GARDNER, Plaintiff and Defendant in Error,
vs.
HENRIETTA MINING & MILLING COMPANY, a Corporation, Defendant and Plaintiff in Error.
} Supersedeas Bond.

Whereas in the above-entitled case, pending in the district court of the fourth judicial district of the Territory of Arizona in and for Yavapai county, at a regular term thereof, to wit, on the 2nd day of April, A. D. 1895, the said J. I. Gardner, plaintiff, recovered a judgment against the said Henrietta Mining and Milling Company, a corporation, for the sum of $12,332.08, with interest thereon from the 2nd day of April, 1895, at 7 per cent. per annum, and all costs of suit, from which judgement the said Henrietta Mining & Milling Company, a corporation, has sued out a writ of error to our supreme court and desires to suspend the execution of said judgement during the pendency of said writ of error:

Now, therefore, we, Henrietta Mining & Milling Company, a corporation, as principal, and American Surety Company of New York, a New York corporation, as surety, do hereby acknowledge ourselves bound to pay unto J. I. Gardner the sum of twenty-six thousand dollars ($26,000.00), conditioned that the said Henrietta
87 Mining & Milling Company, a corporation, shall prosecute its writ of error with effect, and in case the judgement of the appellate court shall be against it that it shall perform its sentence, judgement, or decree and pay all such damages as said court may award against it. (This bond is intended as further and additional security to the bond in like amount already filed.)

Witness the hands and seals of said companies this 3rd day of June, A. D. 1896.

HENRIETTA MINING & MILLING COMPANY,
By GEORGE W. HENRY,
[SEAL] *Pres't & Sec'y.*
AMERICAN SURETY COMPANY OF NEW YORK,
[SEAL.] By JESSE SPALDING, *Res. Vice-Pres't.*
Attest: JOSEPH T. BOWEN,
Res. Ass't Sec'y.

Approved in open court Jan'y 11th, 1896.
(Signed) JNO. J. HAWKINS, *Judge.*

STATE OF ILLINOIS, }
County of Cook, } *ss:*

Joseph T. Bowen, being first duly sworn, states that he is the resident assistant secretary in the State of Illinois for the American Surety Company of New York; that said American Surety Company of New York is a New York corporation; that it has complied with the act of Congress permitting and authorizing it to sign bonds of suretyship in the Territory of Arizona; that it has duly appointed proper agents upon whom service of process can be
88 made and filed the evidence thereof with the clerks of the district court of said Territory; that it has a paid-up capital of $2,500,000; that its surplus over and above its capital stock exceeds in amount the sum of $1,700,000; that it is the owner of real estate, together with the improvements thereupon, situated in the city of New York and also in the city of Chicago, exceeding in value the sum of $2,000,000.

Affiant further states that the said American Surety Company of New York is the owner in fee of the premises known and described as the east one-half (½) of lot six (6), in block thirty-seven (37), in the original town of Chicago, together with the five-story brick and stone building situated thereupon, known as Nos. 63 & 65 Washington street, in the city of Chicago, county of Cook, and State of Illinois, and that the same is free from incumbrance and valued at three hundred thousand dollars ($300,000).

(Signed) JOSEPH T. BOWEN.

Subscribed and sworn to before me this 3rd day of January, A. D. 1896.

[SEAL.] (Signed) FREDERIC F. NORCROSS,
Notary Public.

Upon which is the following endorsement, to wit:

J. I. Gardner, pl't'ff and defendant in error, *vs.* Henrietta M. & M. Co., defendant & pl't'ff in error. Additional supersedeas bond. Approved and filed Jan'y 7th, 1896, at 11.15 o'clock a. m. A. J. Herndon, clerk, by Wm. Wilkerson, deputy. American Surety Company of New York, 313 Tacoma building, Chicago.

89 Know all men by these presents that American Surety Company of New York, a New York corporation, is held and firmly bound unto William H. Barnes, Henry D. Underwood, M. G. S-maniego, and Pedro Charouleau, all of the county of Pima, Territory of Arizona, in the penal sum of twenty-six thousand dollars ($26,000.00); for the payment of which, well and truly — be made, the said American Security Company of New York binds itself and its successors and assigns firmly by these presents.

Signed, sealed, and executed this 3rd day of January, A. D. 1896.

The condition of this obligation is such that whereas in a certain cause now pending in the district court of the fourth judicial district of the Territory of Arizona in and for Yavapai county, in which one J. I. Gardner is plaintiff and defendant in error and Henrietta Mining & Milling Company, a corporation, is defendant and plaintiff in error, the said obligees did, upon the 27th day of December, 1895, sign a certain supersedeas bond in the sum of twenty-six thousand dollars ($26,000.00), conditioned that the said Henrietta Mining & Milling Company, a corporation, should prosecute its writ of error with effect, and in case the judgment of the appellate court should be against it, it would perform the sentence, judgment, and decree of the said court and pay all such damage as said court might award against it:

Now, therefore, if the said American Surety Company of New York shall indemnify and save harmless the said obligees of and from all damages, costs, expenses, or charges of any nature
90 whatsoever which they or either of them may suffer by reason of having executed said supersedeas bond as surety or sureties thereon, then this obligation to be void.

(Signed) AMERICAN SURETY COMPANY OF NEW YORK,
[SEAL.] By JESSE SPALDING, *Res. Vice-Pres't.*
Attest: JOSEPH T. BOWEN, *Res. Ass't Sec'y.*

Upon which is the following endorsement:

No. 2344. Indemnity bond to former sureties. Gardner *vs.* Henrietta M. & M. Co. Filed Jan'y 7th, 1896, at 11.15 o'clock a. m. A. J. Herndon, clerk, by Wm. Wilkerson, deputy. American Surety Company of New York, 313 Tacoma building, Chicago.

91 And on January 8th, 1896, the following assignment of errors was filed, to wit:

In the District Court of Yavapai County, Territory of Arizona.

J. I. GARDNER, Plaintiff and Defendant in Error,
vs.
HENRIETTA MINING AND MILLING CO., Defendant and Plaintiff in Error.
} Assignment of Errors.

The defendant, The Henrietta Mining & Milling Co., and plaintiff in error herein, now comes and assigns the following errors alleged to have been committed by this court at the trial of this cause and in rendering judgement against defendant therein by default and in ordering the property of defendant and plaintiff in error herein sold to satisfy said judgement so rendered by virtue of certain pretended attachment proceedings therein, and because of which defendant and plaintiff in error herein seeks a reversal of said judgement on the writ of error herein sued out, to wit:

First.

Because the said court rendered personal judgement against the said defendant for $12,332.08 and cost- and interest without having any personal service on defendant in said action.

Second.

Because the court rendered judgement that the said attachment of plaintiff in said action be sustained without there having been any actual or constructive notice to defendant of the institution of the said attachment proceedings in the said action, either by
92 publication or otherwise.

Third.

Because the record fails to show that there was any service of copy of complaint in said action on defendant, either by deposit in post-office or otherwise, as is required by par. 713 and 715 of the Revised Statutes of Arizona, defendant's residence being admitted to be out of the Territory and in Chicago, Illinois.

Fourth.

Because the record shows the said trial to have been by the court on constructive service by publication of civil summons and without the publication of the said attachment proceedings or by any other means of service or notice of the same to defendant.

Fifth.

Because the record shows the said trial to have been by the court without any reference to the trial of fact by jury or any waiver of the same being entered of record.

Sixth.

Because the court directed the sale of defendant's property at said trial without rendering any judgement of condemnation of the said property and without having found any fact that authorized the issuance of the writ of attachment in said proceedings as legal grounds therefor, but only on the findings that the indebtedness alleged in each count of the complaint existed, and that an attachment had theretofore issued.

Seventh.

Because the court rendered judgement that the property be sold by virtue of said attachment without any findings of fact that gave grounds for the said attachment, without judgement of lien
93 on said property or condemnation thereof, and on the record showing that the writ of attachment in said action had been issued before the due institution of the said action or before the issuance of the summons therein, and that the said attachment was

issued and the same was levied before the said summons had ever been issued and delivered to the sheriff charged with its execution; hence, therefore, and because of the same the said attachment was void.

Eighth.

Because there was no report of said sale so order-, nor any confirmation of any such sale returned.

Wherefore defendant in said action and plaintiff in error herein prays that the said cause be reviewed by the supreme court of the Territory of Arizona, and at the hearing of the same that the said attachment proceedings and the said judgement so rendered thereunder be declared void and of no effect, as well as all of said judgement, and for all proper and general relief.

(Signed) J. F. WILSON,
Attorney for Def't & Plaintiff in Error.

Upon which is endorsed as follows:

J. I. Gardner, pl'ff & def't in error, *vs.* Henrietta M. & M. Co., def't & pl'ff in error. No. 2344. Assignment of errors. Filed and transcript demanded Jan'y 8th, 1896, at 9 o'clock a. m. A. J. Herndon, clerk, by Wm. Wilkerson, deputy, J. F. Wilson, attorney for pl'ff in error.

94 The District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

Met Monday, November 5th, 1894, at 10 o'clock a. m., pursuant to law.

Present: His honor John J. Hawkins, judge; sheriff, by deputy, and clerk.

(*Opening Order, November Term*, 1894.)

95 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

J. I. GARDNER
vs.
HENRIETTA M. & M. Co. } No. 2344.

On motion of Messrs. Herndon & Norris, counsel for plaintiff, it is ordered that this cause be placed on the court calendar; and it appearing to the court that defendant has been regularly served with summons and the legal time for answering having expired and the said defendant having wholly failed to appear and answer, but having made default, which said default was heretofore duly entered by the clerk of this court—

Plaintiff and his counsel being present in court and defendant appearing not, plaintiff answering ready for trial and waiving a jury, the court, sitting without a jury, proceeded with the trial.

Witness James I. Gardner was sworn and testified in his own behalf and documentary evidence, lien, etc., was admitted on part

of the plaintiff, and the evidence being closed, the court finds therefrom and from the pleadings that plaintiff is entitled to judgement, as prayed for. Therefore, upon motion of Mess. Herndon & Norris, it is ordered that judgement be entered for plaintiff, as prayed for and as per decree, that the lien herein be, and the same is, foreclosed.

Court adjourned until 9.30 o'clock a. m. tomorrow, April 3rd, A. D. 1895.

(Signed) J. D. BETHUNE, *Judge.*

96 *Closing Order, November Term*, 1894.

Court adjourned for the term.

(Signed) JNO. J. HAWKINS, *Judge.*

97 In the District Court of Yavapai County, Arizona Territory.

JAMES I. GARDNER, Plaintiff,
vs.
HENRIETTA MINING AND MILLING COMPANY, a Corporation, Defendant.

TERRITORY OF ARIZONA, *County of Yavapai*, } *ss:*

—, Andrew J. Herndon, clerk of the above court, certify the above and foregoing transcript on petition in error, consisting of 197 folios, to be a full, true, and correct copy of all the files and records in the above cause, and that the same constitutes a correct transcript of the original papers, judgment-roll, and records as the same appears from the originals on file in my office. I further certify that said transcript contain- full, free, and correct copies of—

1. Complaint.
2. Affidavit of attachment.
3. Bond for attachment.
4. Writ of attachment and return thereon.
5. Affidavit of non-residence.

98 6. Summons and return thereon.
7. Default.
8. Judgment.
9. Certificate to judgment-roll.
10. Petition for writ of error.
11. Cost bond on writ of error.
12. Supersedeas bond.
13. Citation in error.
14. Certificate granting writ of error.
15. Notice excepting to sufficiency of supersedeas bond.
16. Amended petition for writ of error. (170.)
17. Addition- supersedeas bond. 186.
18. Assign- of errors. 193.
19. Court minutes.

And I further certify that said transcript was demanded of me by

J. F. Wilson on January 8, 1896, and was delivered to said J. F. Wilson on Nov. 23rd, 1896.

In testimony whereof I have hereunto set my hand and affixed my official seal this 23rd day of Nov., 1896.

(Signed) A. J. HERNDON,
Clerk. [SEAL.]

99 In the Supreme Court of the Territory of Arizona.

HENRIETTA MINING & MILLING COMPANY, Plaintiff in Error,
vs.
JAMES I. GARDNER, Defendant in Error.

Be it remembered that on the 11th day of January, 1897, the same being one of the judicial days of the January term, 1891, of the supreme court of Arizona, the following proceedings were had in the above-entitled cause in said court, to wit:

It is ordered that this cause be set for hearing on Friday, January 15th, 1897.

Be it further remembered that on the 15th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

This cause came on regularly to be heard on this day and was argued by J. F. Wilson for plaintiff in error, and by J. C. Herndon and Mr. Morrison for defendant in error, and cause ordered submitted.

100 Be it further remembered that on the 23rd day of February, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the lower court herein be, and the same is hereby, affirmed.

And it is further ordered and adjudged that the defendant in error herein recover against the plaintiff in error herein and Wm. H. Barnes, Henry D. Underwood, M. G. Samaniego, Pedro Charonleau, and the American Surety Company of New York, a corporation, the sureties on the supersedeas bonds herein, the sum of twelve thousand three hundred and thirty-two and $\frac{8}{100}$ dollars, with interest thereon, at the rate of seven per cent. per annum, from the 2nd day of April, 1895, until paid, and the sum of twenty-three and $\frac{95}{100}$ dollars, defendants in error's costs in the lower court and his costs in this court, taxed at twenty-two and $\frac{5}{100}$ dollars, and have execution therefor.

101 In the Supreme Court of the Territory of Arizona.

HENRIETTA MINING AND MILLING Co., Plaintiff in Error,
vs.
J. I. GARDNER, Defendant in Error.

And now comes plaintiff in error and moves the court for a rehearing of this cause. The plaintiff alleges that the defendant resides in Prescott, Arizona, and that Messrs. Herndon & Norris and R. E. Morrison, Esq., residing at Prescott, Arizona, are the attorneys for the defendant in error.

The grounds of the motion for rehearing which the plaintiff allege- are as follows:

First. It is apparent that the court misapprehends the facts in the case. The facts are that a writ of attachment was issued in this case before the issuance of the summons in the case. That fact seems to have been overlooked, and yet it is the ruling fact in the case. The statute, Acts of '91, page 49, says: "The plaintiff, at the time of issuing the summons or any time afterwards, may have the property of the defendant attached." In this case the plaintiff had the property of the defendant attached before the issuance of the summons, squarely and flatly in violation of the statute, and
102 for the court to hold that the property may be attached before summons is issued is for the court to legislate on this subject, and is a legislation in a case where the legislature itself has spoken and has refused to make a law such as the court makes. It seems clear to us that the court overlooked this material fact in this record, and for this reason we ask a rehearing of this cause, that the court may consider that fact, as we think it is the ruling fact of the case.

Second. It is apparent that the court overlooked the fact that the record shows that personal judgment was rendered upon no other but the void writ of attachment, and the service was by publication and not by personal service, which is in violation of the fundamental doctrine that personal judgment cannot be rendered at all upon service by publication.

Third. This was a proceeding purely *in rem* under our statute, and could only avail by virtue of attaching property with service of publication. If the attachment was void, the whole proceeding falls. There is no *rem* to act upon, and the attachment, being before the summons, is a violation of the license given by statute, and hence is void. In addition to that, the personal judgment rendered against the defendant is void for the reason that even if the attachment was properly levied, the judgment could only reach the
103 property attached; but as it stands now it is a personal judgment, which may avail against any other property of the defendant, and may be transferred to another State where the defendant may have property or where the defendant may reside and other property be reached.

We ask the court to reconsider and to grant the plaintiff a rehearing on this subject, to the end that justice may be done.

Very respectfully, BARNES & MARTIN.
J. F. WILSON.

(Endorsed:) No. 539. Henrietta Mining & Milling Co. *vs.* J. J. Gardner. Petition for rehearing, March 10. Filed March 10, 1897. J. L. B. Alexander, clerk.

104 In the Supreme Court of the Territory of Arizona.

HENRIETTA MINING & MILLING CO., Plaintiff in Error,
vs.
J. I. GARDNER, Defendant in Error.

A motion for rehearing having been this day served upon the defendant in error, together with precept issued by the clerk of the supreme court, the said defendant in error now comes and in answer thereto says—

That all of the grounds for rehearing set up in said motion were fully presented to the court by the brief of counsel for plaintiff in error and in oral argument, and no other points then those raised in the briefs and in the oral argument are contained in said motion for rehearing.

Wherefore defendant in error says that said motion for rehearing should be denied; and defendant in error now comes and waives time and consent that said motion for rehearing may be heard and considered by the court at the next sitting thereof, without delaying the hearing of said motion for the statutory period of 10 days from the service thereof.

Respectfully submitted.

R. E. MORRISON,
HERNDON & NORRIS,
105 *Attorneys for Defendant in Error.*

(Endorsed:) No. 539. In the supreme court of the Territory of Arizona. Henrietta Mining and Milling Co., plaintiff in error, *vs.* J. I. Gardner, defendant in error. Answer to motion for rehearing and consent that motion be heard at next sitting of court. Service of within acknowledged by receipt of a copy thereof this 13th day of March, 1897. —— ——, attorney for pl'ff in error. Filed March 15th, 1897. J. L. B. Alexander, clerk. Law office Herndon & Norris, Prescott, Arizona.

Be it further remembered that on the 16th day of March, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

In this cause it is ordered that plaintiff in error's motion for rehearing filed herein be submitted.

Be it further remembered that on the 17th day of March, 1897,

the same being one of the judicial days of the January term,
106 1897, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

In this cause it is ordered that the motion for rehearing filed herein by plaintiff in error be denied.

Be it further remembered on the said above last-named day the following further proceedings were had in said cause in said court, to wit:

Mr. W. H. Barnes, attorney for plaintiff in error, in open court moved the court for an allowance of an appeal to the United States Supreme Court, and fix the appeal bond therein. Ordered that appeal be allowed and bond on appeal fixed at $1,000.

And be it further remembered that on the said above last-named day the following further proceedings were had in said cause in said court, to wit:

In this cause Mr. W. H. Barnes, for plaintiff in error, moved the court to stay the remittitur in this cause for sixty days.

Whereupon it was ordered that such stay be granted, as prayed for.

107 In the Supreme Court of the Territory of Arizona.

THE HENRIETTA MINING & MILLING CO., Plaintiff in Error,
vs.
JAMES I. GARDNER, Defendant in Error.

J. F. Wilson and William H. Barnes, being duly sworn, deposeth and say that they are the attorneys for the plaintiff in error in this cause and agents of the said plaintiff in this behalf.

They state that the matter in dispute in the said cause exceeds the sum of five thousand dollars, exclusive of interest and cost, being, as a matter of fact, the amount of the said judgment as appears from the record in the said cause. Further affiants sayeth not.

WM. H. BARNES.
J. F. WILSON.

Subscribed and sworn to before me this the — day of March, 1897.

WM. H. B.

(Endorsed:) No. 539. Gardner *vs.* Henrietta, &c., Co. Affidavit of value of matters in dispute. Filed March 17, 1897. J. L. B. Alexander, clerk.

108 In the Supreme Court of the Territory of Arizona.

THE HENRIETTA MINING & MILLING CO., Plaintiff in Error,
vs.
JAMES I. GARDNER, Defendant in Error.

Now comes the appellant in this cause, The Henrietta Mining and Milling Co., and now here gives notice of appeal to the Supreme

Court of the United States and asks that such notice be entered upon the minutes of this court.

And the appellant also prays an appeal of this cause to the Supreme Court of the United States upon the appellant entering into bond, conditioned according to law, in such sum as the court may determine to be approved according to law.

Appellant makes this prayer upon the ground that the matter in dispute exceeds five thousand dollars, exclusive of cost.

J. F. WILSON &
W. H. BARNES,
Attorney- for Appellant.

(Endorsed:) No. 539. Gardner *vs.* Henrietta, etc., Co. Notice of appeal. Filed March 17, 1897. J. L. B. Alexander, clerk.

109 In the Supreme Court of the Territory of Arizona.

THE HENRIETTA MINING AND MILLING Co., Plaintiff in Error,
vs.
JAMES I. GARDNER, Defendant in Error.

Now comes the plaintiff in error and appellant in this cause and alleges that there is manifest error in the proceedings of the said cause in the above and said supreme court in this, viz:

First.

The court erred in holding that there was any service of process upon the defendant and plaintiff in error, the said Henrietta Mining & Milling Co., and the court erred in not reversing the case for want of service.

Second.

The court erred in holding that the attachment in the said cause was valid and not void, the same having been issued before there was any summons issued, in violation of the statute of the Territory of Arizona.

Third.

The court — in affirming the judgment of the court below, the same being a personal judgment on constructive service, and
110 a judgment in attachment proceedings on a void writ

Fourth.

The court erred in not reversing the said judgment and in not sustaining the errors assigned in the record and proceeding in the trial court.

Appellant there- prays that the said judgment be reversed and remanded, with such direction by the Supreme Court of the United States as the same may determine.

By J. F. WILSON AND
WM. H. BARNES,
Attorneys for Appellant Company.

(Endorsed:) No. 539. Gardner *vs.* Henrietta, &c., Co. Assignment of errors. Filed March 17, 1897. J. L. B. Alexander, clerk.

111 In the Supreme Court of the Territory of Arizona.

THE HENRIETTA MINING & MILLING CO., Appellant, *vs.* JAMES I. GARDNER, Appellee. } Petition for Appeal.

The above-named appellant, The Henrietta Mining & Milling Company, conceiving itself aggrieved by the final judgment entered by the supreme court of the Territory of Arizona on the — day of ——, 1897, in the above-entitled cause, in which the judgment of the district court of the fourth judicial district of the Territory of Arizona in and for the county of Yavapai was affirmed, and in which the attachment issued in the said cause was sustained, and the judgment against the said appellant sustained, and *to* order for the sale of appellate property named in the said attachment ordered sold to satisfy the said judgment also sustained, all of which judgments and orders were by default and on constructive service, and which said judgment of the said supreme court was rendered on appellants having brought said judgment of the said district court to said supreme court for review on writ of error, and prayed for the
112 reversal of the same, and remanding the same back to the said court below for trial as prayed:

Therefore the said appellant hereby appeals from the said judgment of the said supreme court of the Territory of Arizona to the Supreme Court of the United States, and prays that its appeal may be allowed, and that a transcript of the record and proceedings, the judgment, decision, and opinion in this cause be certified and duly authenticated and sent to the Supreme Court of the United States.

BARNES & MARTIN AND
J. F. WILSON,
Attorney- for Appellant.

And now, to wit, on the 7th day of April, 1897, the appeal prayed for in the foregoing petition is hereby allowed, with citation to issue on filing a bond in the penal sum of one thousand dollars ($1,000), with two or more good and sufficient sureties or such other surety as is required by law, approved by the chief justice of the supreme court of the said Territory of Arizona.

A. C. BAKER,
Chief Justice of the Supreme Court of Arizona.

(Endorsed:) No. 539. Henrietta Mining & M. Co., appellant, *vs.* James I. Gardner, appellee. Appeal. Filed April 9, 1897. J. L. B. Alexander, clerk.

113 In the Supreme Court of the Territory of Arizona.

THE HENRIETTA MINING & MILLING CO., Appellant,
vs.
JAMES I. GARDNER, Appellee.
} Statement of Facts.

Statement of facts by the supreme court of the Territory of Arizona, sitting as a court of appeal and review on writ of error on the foregoing transcript, on petition and writ of error from the district court of the fourth judicial district *court* of the Territory of Arizona within and for the county of Yavapai, wherein the judgment was rendered on default, in which court the said district court rendered judgment on the pleadings made by appellee, James I. Gardner, and the return in said record certified up to this court and exhibits therein contained, and which judgment has been brought to this court by petition and writ of error in said record shown.

The supreme court of the Territory of Arizona takes the facts certified by the clerk of the district court of Yavapai county as found in the record shown by the judgment by default ren-
114 dered in the said court of Yavapai, the same being the court below, and the petition in error filed therein, with the assignment of errors made by the appellant herein and the facts shown by the whole record herein, as the facts shown in this cause, and makes the same the statement of facts as found in the transcript in this cause the facts as found in this case.

From such transcript and from the same as the statement of facts herein, this court finds that the said district court did not commit error in rendering judgment against the said appellant for the amount named in the said judgment and did not commit error in sustaining the attachment in said cause sued out and in directing the sale of the said property of appellant named in said attachment.

The supreme court further finds that the judgment of the said district court should be affirmed, and therefore affirms the same.

This the — day of April, A. D. 1897.

The above statement is a true statement of facts in this case and is the record herein.

A. C. BAKER,
Chief Justice of Arizona.
OWEN T. ROUSE,
Associate Justice.

The foregoing, is my judgment, represents a fair state-
115 ment of the case of The Henrietta Mining & Milling Co. *vs.* James I. Gardner, as shown by the record to the supreme court and the action of the court thereon.

J. D. BETHUME,
Justice of the Supreme Court.

(Endorsed:) No. 539. Henrietta M. & M. Co., appellant, *vs.* James I. Gardner, appellee. State- of facts. Filed April 9, 1897. J. L. B. Alexander, clerk.

In the Supreme Court of the United States.

THE HENRIETTA MINING & MILLING CO., Appellant, *vs.* JAMES I. GARDNER, Appellee. } Assignment of Errors.

The appellant in the above cause, and which was defendant in the court below, comes and makes the following assignment of errors alleged to have been committed by the supreme court of Arizona:

116 The supreme court of the Territory of Arizona, sitting as a court of appeals and review, and reviewing the proceedings of the district court of the fourth judicial district of Arizona within and for the county of Yavapai, on petition and writ of error of the appellant herein, erred in the affirming the said judgment of the said district court as follows:

First. Erred in sustaining the judgment of the district court in which that court rendered personal judgment against defendant there, the appellant herein, for the sum of $12,332.05, with cost and interest thereon, on constructive service alone and without any kind of personal service whatever.

Second. Erred in sustaining the judgment of the said court below in which the attachment proceedings were sustained and judgment of foreclosure of the same ordered without there having been any actual or constructive notice of any kind whatever given to defendant of the institution of any such proceedings or of any other kind, and therefore erred in holding that attachment proceedings may be instituted and foreclosed against appellant's property without any notice whatever of such proceedings.

Third. Erred in sustaining the judgment of the said court below in rendering judgment that the said property attached in the

117 said action be sold without any finding of fact on which to base the same, and without any judgment of condemnation of the same.

Fourth. Erred in sustaining the said judgment of the court below in which the said court held that the attachment in the said cause which was issued and executed before the issuance and delivery of the summons was valid under the statute providing for the issuance of the writ of attachment at any time after or at the time of the issuance of the summons in the action. Hence erred in holding that writs of attachment issued before the issuance of summons in the action are valid, notwithstanding the provisions of the statute "that at the time, or at any time after the issuance of the summons," &c., writs of attachment issue, &c.; and hence erred in not holding that the said attachment in this case was void, and

therefore erred in not reversing the said judgment and remanding the same for further proceedings.

For all of which appellant prays a reversal, &c.

WM. H. BARNES,
J. F. WILSON,
Attorneys for Appellant.

(Endorsed:) No. 539. Henrietta M. & M. Co., appellant, *vs.* James I. Garnder, appellee. Assignment of errors. Filed April 9, 1897. J. L. B. Alexander, co.

118 In the Supreme Court of the United States.

THE HENRIETTA MINING & MILLING CO., Appellant, *vs.* JAMES I. GARDNER, Appellee. } Appeal Bond.

Known all men by these presents that we, The Henrietta Mining and Milling Company, as principal, and The American Surety Company of New York, do hereby acknowledge ourselves to be firmly held and firmly bound to James I. Gardner, the appellee herein, in the sum of one thousand dollars, to be paid to him, his executors, administrators, heirs, or assigns, — which payment, well and truly to be made, we bind ourselves and each of us and our successors or assigns, both jointly and severally, firmly by these presents.

The conditions of the above obligation are such that — the above-named appellant shall prosecute its appeal to effect and if it fails to make its plea good shall answer and pay all cost, then this bond shall be void; otherwise to remain in full force and effect.

Witness our hands and seals this the 31st day of March,
119 1897.

THE HENRIETTA MINING & MILLING CO.,
[SEAL.] By GEO. W. HENRY,
President and Secretary.
AMERICAN SURETY COMPANY OF NEW YORK,
[SEAL.] By JOSEPH J. BOWEN,
Res. Vice-Pres't.

Attest: FREDERIC F. NORCROSS,
Att'y & Res. Ass't Sec'y.

STATE OF ILLINOIS, }
County of Cook. }

Frederic F. Norcross, being first duly sworn, states that he is the resident assistant secretary of and in the State of Illinois for the American Surety Company of New York; that the American Surety Company of New York is a New York corporation; that it has duly appointed agents and complied with the acts of Congress permitting it and authorizing it to sign bonds of suretyship in the

Territory of Arizona; that it has duly appointed proper agents there upon whom service of process can be made, and has filed the evidence thereof with the clerks of the district court of said
120 Territory; that it has a paid-up capital of $2,500,000; that its surplus exceeds over and above its capital stock in amount the sum of $1,700,000; that it is the owner of real estate, together with the improvements thereon, situated in the city of New York and also in the city of Chicago, exceeding in value the sum of $2,000,000.

Affiant further states that the said American Surety Company of New York is the owner in fee of the premises known and described as the east one-half (½) of lots six (6), in block thirty-seven (37), in the original town of Chicago, together with the five-story brick and stone building situated thereon, known as Nos. 63 & 65 Washington street, in the city of Chicago, county of Cook, and State of Illinois, and that the same is free from incumbrances and is valued at the sum of three hundred thousand dollars ($300,000).

(Signed) FREDERIC F. NORCROSS.

Subscribed and sworn to before me this the 1st of April, 1897. In witness whereof I hereto set my hand and cause the seal of my office to be hereto affixed this day and date above named.

[SEAL.] R. R. GILKEY,
Notary Public.

121 I, A. C. Baker, chief justice of the supreme court of the Territory of Arizona, hereby approve of the within bond and of the sufficiency of the sureties thereto this the 7 day of April, A. D. 1897.

A. C. BAKER,
Chief Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 539. Henrietta M. & M. Co. *vs.* J. I. Gardner. Appeal bond. Filed April 9th, 1897. J. L. B. Alexander, clerk.

In the Supreme Court of the Territory of Arizona.

J. I. GARDNER, Plaintiffs and Appellees,
vs.
THE HENRIETTA MINING COMPANY, Defendant and Appellant.

It appearing to the undersigned judges of said court that an appeal has been perfected in said cause from said court to the
122 Supreme Court of the United States, it is therefore ordered that all proceedings under the order and judgment of the said supreme court of Arizona in said cause be stayed until the final order of the said Supreme Court of the United States, and if remittitur has been issued therein the clerk of said supreme court of

Arizona shall forthwith issue a supersedeas directing the recall of such remittitur, and that all proceedings thereunder be stayed.

June 22nd, 1897.

OWEN T. ROUSE,
Associate Justice Supreme Court Ariz.
J. D. BETHUME,
Associate Justice Supreme Court Ariz.

I decline to sign this order because no supersedeas bond has been given, as required by law, and the remittitur sought to be recalled is proper.

A. C. BAKER,
Chief Justice.

I concur with Chief Justice Baker and decline to sign this order for reason stated by him.

JNO. J. HAWKINS,
Associate Justice.

(Endorsed:) No. 539. In the supreme court, Territory of Arizona. Henrietta Mining & Milling Co. *vs.* J. I. Gardner. Order
123 directing supersedeas and recalling remittitur. The judges of the court being equally divided as to the propriety of issuing supersedeas and recalling of the remittitur issued in this cause, no supersedeas is issued and the recall of the remittitur is not made, as is herein sought to be directed. Filed June 23rd, 1897. J. L. B. Alexander, clerk.

124 UNITED STATES OF AMERICA, *ss:*

To J. J. Gardner, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to an appeal allowed & filed in the clerk's office of the supreme court of the Territory of Arizona, wherein The Henrietta Mining and Milling Company is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

A. C. BAKER,
Chief Justice of the Supreme Court of Arizona.

125 [Endorsed:] Original. Lodged in my office this 15th day of June, 1897. J. L. B. Alexander, clerk supreme court of Arizona.

On this 11th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared J. P. Dillon

before me, the subscriber, and makes oath that he delivered a true copy of the within citation to J. I. Gardner.

J. P. DILLON.

Sworn to and subscribed the 11th day of June, A. D. 1897.

C. P. HICKS,
Clerk of the Probate Court.

126 Supreme Court of the United States.

HENRIETTA MINING AND MILLING Company, Appellant, *vs.* JAMES I. GARDNER, Appellee. } No. 422. Appeal from the Supreme Court of the Territory of Arizona.

Whereas in the district court of the fourth judicial district of the Territory of Arizona in and for Yavapai county, at a regular term thereof, to wit, on the 2nd day of April, A. D. 1895, the said James I. Gardner, plaintiff, recovered a judgment against the said Henrietta Mining and Milling Company, a corporation, for the sum of $12,332.08, with interest thereon from the 2nd day of April, 1895, at 7 per cent. per annum, and all costs of suit; from which judgment the said Henrietta Mining and Milling Company, a corporation, sued out a writ of error to the supreme court of the Territory of Arizona; and

Whereas the said supreme court of the Territory of Arizona did on the 11th day of January, 1897, order that said judgment be affirmed and said Henrietta Mining and Milling Company prayed an appeal to the Supreme Court of the United States; which appeal was allowed upon said corporation filing an appeal bond in the penal sum of $1,000.00, with surety, to be approved by the Chief Justice of said Supreme Court; and

Whereas the said Henrietta Mining and Milling Company did afterwards file in said Supreme Court its said appeal bond,
127 which was duly approved by the Chief Justice of said Supreme Court, and thereupon an order was made and entered in said cause in said supreme court of the Territory of Arizona by two of the justices thereof that a supersedeas issue to the said district court directing the recall of remittitur; and

Whereas the clerk of said supreme court of the Territory of Arizona afterwards refused to issue said supersedeas and to recall said remittitur and the said Henrietta Mining and Milling Company desires to suspend the execution of said judgment during the pendency of said appeal to the Supreme Court of the United States:

Now, therefore, we, the Henrietta Mining and Milling Company, a corporation, as principal, and American Surety Company of New York, a New York corporation, as surety, do hereby acknowledge ourselves bound to pay unto James I. Gardner the sum of twenty-six thousand dollars ($26,000.00), conditioned that the said Henrietta Mining and Milling Company, a corporation, shall prosecute its appeal to effect and answer all damages if it fail to make its plea

good, and in case the judgment of the Supreme Court of the United States shall be against it, that it shall pay the whole amount of said judgment, including just damages for delay, and costs and interest.

Witness the hands and seals of said companies this 22nd day of July, A. D. 1897.

{ Corporate Seal, Henrietta Mining and Milling Company, Chicago, Ills. }

HENRIETTA MINING AND MILLING COMPANY,
By GEORGE W. HENRY,
President and Secretary.

[Seal of American Surety Company, New York.]

AMERICAN SURETY COMPANY OF NEW YORK,
By JESSE SPALDING, *Res. Vice-Pres't.*

Attest: DANIEL T. HUNT,
Res. Ass't Sec'y P. T.

128 STATE OF ILLINOIS, } ss:
County of Cook, }

On this 22nd day of July, one thousand eight hundred and ninety-seven, before me personally *b*ame Jesse Spalding, known to me to be the resident vice-president of the American Surety Company of New York, the corporation described in and which executed the annexed bond of Henrietta Mining and Milling Company, as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the city of Chicago, county of Cook and State of Illinois; that he is the resident vice-president of said American Surety Company of New York and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Henrietta Mining and Milling Company is the corporate seal of said American Surety Company of New York and was thereto affixed by order and authority of the board of directors of said company, and that he signed his name thereto by like order and authority as resident vice-president of said company, and that he is acquainted with Daniel T. Hunt and knows him to be the resident assistant secretary *pro tem.* of said company, and that the signature of said Daniel T. Hunt subscribed to said bond is in the genuine handwriting of said Daniel T. Hunt and was thereto subscribed by order and authority of said board of directors and in the presence of said deponent, and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts, and liabilities of every nature whatsoever by more than the sum of one million dollars.

JESSE SPALDING.

Sworn to, acknowledged before me, and subscribed in my presence this 22nd day of July, 1897.

[Seal of R. R. Gilkey, Notary Public, Cook Co., Ill.]

R. R. GILKEY.

129 [Endorsed:] The within bond approved this 28th day of July, 1897. George Shiras, Jr. American Surety Company of New York, 313 Tacoma building, Chicago.

130 [Endorsed:] Case No. 16,635. Supreme Court U. S., October term, 1897. Term No., 422. The Henrietta Mining & Milling Co., app't, *vs.* James I. Gardner. Supersedeas bond. Approved by Mr. Justice Shiras July 28, 1897. Office Supreme Court U. S. Filed Aug. 14, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,635. Arizona Territory supreme court. Term No., 140. The Henrietta Mining and Milling Company, appellant, *vs.* James I. Gardner. Filed July 23d, 1897.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

THE HENRIETTA MINING AND MILLING COMPANY, APPELLANT,

vs.

JAMES I. GARDNER, APPELLEE.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order of the Supreme Court of the Territory of Arizona, affirming a judgment of the District Court of the Fourth Judicial District of said Territory, in and for Yavapai county, for $12,332.08, in favor of James I. Gardner, appellee, and against the Henrietta Mining and Milling Company, appellant here, and plaintiff in error below.

This was an action in the District Court by appellee against appellant, upon an open account, and a large number of assigned accounts, all of which were declared on in an action of debt. An attachment writ was sent out also, and all mines and mining property belonging to appellant company were seized and ordered sold, to satisfy the judgment *in personam*, rendered on an alleged default of said company.

These proceedings, and all that took place in the course of them, arose and proceeded in the following order and dates, to wit:

(1) The complaint and exhibits (Tr. p. 1 to 29 inclusive) were filed December 4, 1894.

(2) Affidavit for attachment was filed December 24, 1894 (Tr. p. 30).

(3) Bond for attachment was filed same date (Tr. p. 31–32).

(4) Writ of attachment was issued same date (Tr. p. 31–32).

(5) Return of writ December 26, 1894, shows seizure of vast amount of defendant's property (Tr. p. 32–33).

(6) December 26, 1894, affidavit of non-residence was made and filed (Tr. p. 33–34), as follows, to wit:

"James I. Gardner, being first duly sworn, deposes and says that "he is the plaintiff in the above entitled action; that the defendant "is a corporation organized and existing under and by virtue of "the laws of the State of Illinois, and doing business and owning "property in the said county of Yavapai, Territory aforesaid, but "has no legally appointed and constituted agent in this Territory; "that he is informed and believes, and upon such information and "belief states the fact to be, that the principal office of the said cor- "poration is in the City of Chicago, State of Illinois, and as to a "more definite address of said defendant in said city he is not "advised. (Signed)

JAMES I. GARDNER."

(Subscribed and sworn to.)

(7) December 26, 1894, *and not before*, summons was issued. (Tr. p. 34.)

(8) February 25, 1895, summons was returned. The return is as follows:

"Office of the sheriff of Yavapai County.

"I hereby certify that I received the within summons on the 28th "day of December, 1894, and personally served the same on the "defendants by causing to be published once a week for four weeks "in the Prescott Courier, a newspaper published at Prescott, "Yavapai County, Arizona, as follows, January 4, January 11, "January 18 and January 25, 1895, a true copy of the complaint in "the action named in said summons, attached to said summons. "A copy of said summons is hereto attached and made a part of "this return. Dated this 25th day of February, 1895.

G. C. RUFFNER, Sheriff,
By J. P. Dillon, Deputy.

(9) December 26, 1895, affidavit of publication of summons was filed. (Tr. p. 35–36).

(10) April 2, 1895, default was entered. (Tr. p. 36.)

(11) Same date, judgment *in personam* was rendered and property ordered sold. (Tr. p. 36–40.)

(12) April 4, 1895, judgment roll was certified. (Tr. p. 40.)

It will be seen from the record that the proceedings from the filing of the complaint to the certificate of the judgment roll occurred in the exact order here stated.

The only service attempted upon appellant shown by the record is the publication above certified by the sheriff.

Par. 712, R. S. Ariz., provides for filing affidavit for publication of summons, viz.:

"When any party to a suit, his agent or attorney, shall make "affidavit at the time of instituting the suit or at any time during "its progress that the defendant is a non-resident of the terri- "tory, or that he is absent from the territory, or that he is a "transient person, or that his residence is unknown to the "affiant, or is a corporation incorporated under the laws of

"any other state or territory or foreign country, and doing "business in this territory or having property therein, but having "no legally appointed and constituted agent in this territory, or "that such defendant conceals himself to avoid the service of sum- "mons, the clerk shall issue a summons directed to the defendant "as in other cases, and shall deliver the same to the sheriff of the "county in which the suit is pending, and said sheriff shall serve "the same by making publication thereof in some newspaper pub- "lished in his county, etc. * * * Such summons shall be "published at least once in each week for four successive weeks."

Paragraph 713, R. S. Ariz., provides that *when the residence of the defendant is known*, the plaintiff, his agent or attorney, shall forthwith deposit in the postoffice, postage prepaid, a copy of the summons and complaint, directed to the defendant at his place of residence.

It is stated in the affidavit of appellee, that appellant company is a corporation organized under the laws of the State of Illinois, and upon his information and belief, that its principal office is in the City of Chicago, State of Illinois.

No copy of the summons and complaint was deposited in the postoffice, postage prepaid, directed to the defendant at its place of residence, as required by this statute.

The statute of Arizona, acts of 1891, page 49, provides:

"*The plaintiff at the time of issuing the summons or at* any time "thereafter" (not before) "may have the property of the defendant "attached as security for the satisfaction of any judgment that may "be recovered, unless the defendant give security to pay such judg- "ment," etc.

In this case the writ of attachment was issued December 24, 1894, (Tr. 31–32) two days *before* summons, which was issued December 26, 1894. (Tr. 34–35.)

This is the condition in which appellant, December 28, 1895, found the record when the petition in error was filed and proceedings thereon taken. (Tr. p. 40).

The errors assigned arise from the face of the record.

ERRORS ASSIGNED.

The errors here assigned upon the record (Tr. pg. 61) are :

1st. The court erred in sustaining the judgment of the District Court in which that court rendered personal judgment against defendant there, the appellant herein, for the sum of $12,332.05, with cost and interest thereon, on constructive service alone and without any kind of personal service whatever.

2d. The court erred in sustaining the judgment of the said court below in which the attachment proceedings were sustained and judgment of foreclosure of the same ordered, without there having been any actual or constructive notice of any kind whatever given to defendant of the institution of any such proceedings or of any other kind, and therefore erred in holding that attachment

proceedings may be instituted and foreclosed against appellant's property without any notice whatever of such proceedings.

3d. The court erred in sustaining the judgment of the said court below in rendering judgment that the said property attached in the said action be sold without any finding of fact on which to base the same, and without any judgment of condemnation of the same.

4th. The court erred in sustaining the said judgment of the court below, in which the said court held that the attachment in the said cause, which was issued and executed before the issuance and delivery of the summons, was valid under the statute providing for the issuance of the writ of attachment at any time after or at the time of the issuance of the summons in the action. Hence the court erred in holding that writs of attachment issued before the issuance of summons in the action are valid, notwithstanding the provisions of the statute "that at the time, or at any time after the issuance of the summons," etc., writs of attachment issue, etc.; and hence the court erred in not holding that the said attachment in this case was void, and therefore the court erred in not reversing the said judgment and remanding the same for further proceedings.

The errors assigned in the Supreme Court of the Territory March 17, 1897 (Tr., pg. 58), are:

First. The court erred in holding that there was any service of process upon the defendant and plaintiff in error, the said Henrietta Mining and Milling Co., and the court erred in not reversing the case for want of service.

Second. The court erred in holding that the attachment in the said cause was valid, and not void, the same having been issued before there was any summons issued, in violation of the statute of the Territory of Arizona.

Third. The court erred in affirming the judgment of the court below, the same being a personal judgment on constructive service, and a judgment in attachment proceedings on a void writ.

Fourth. The court erred in not reversing said judgment and in not sustaining the errors assigned in the record and proceedings in the trial court.

BRIEF.

1. The judgment of the District Court, *in personam*, against appellant, a non-resident of the Territory, without personal service of process upon it, or its appearance, is without any validity.

Penoyer v. *Neff*, 95 U. S. 714, and cases there cited.

2. The judgment sustaining the attachment and directing a sale of the property attached, is void, because such judgment can not be lawfully rendered without *notice of some kind*, to the owner of the property that such proceeding has been instituted.

Drake on Attachments, 6th Ed., 436 *et seq.*

Edwards v. *Toomer*, 14 Smedes & Marshall, 75.

Cummings v. *Tabor*, 61 Wis. 185.
Warner v. *Webster*, 13 Ohio, 505.
Earle v. *McVeigh*, 95 U. S. 503.
3 Am. & Eng. Ency. of Law, 2d Ed., pgs. 184, 185.

3. When judgment is obtained by default, upon publication of notice, every requirement of the statute must be observed.
Drake on Attach., 6th Ed. 436 *et seq.*

4. The attachment, issued *before* the summons, is a nullity.
Encyc. Plead., Vol. 3, page 50.
Hall v. *Grogan*, 78 Ky. 11.
Keller v. *Stanley*, 86 Ky. 240.
Low v. *Henry*, 9 Cal. 558.

ARGUMENT.

Having no notice of the suit, and no knowledge of the judgment until months after its entry, appellant is confined strictly to the record made by appellee.

It is alleged in the complaint, and also in the affidavit of non-residence, that appellant is a foreign corporation organized under the laws of Illinois, with situs or residence in the city of Chicago, and without local agent in Arizona.

The fact that appellant company is a non-resident, and that its residence or situs was known to appellee, and that there was no personal service, are the basis of the first three assignments of error.

The face of the judgment shows it to be a judgment *in personam*. (Tr. 38, Rec. 63.)

The return of the sheriff is that he "personally served the same on the defendants *by causing to be published*" * * * a true copy of the complaint.

As Par. 713, R. S. Ari., requires that *when the residence of the defendant is known*, the plaintiff, his agent or attorney, shall forthwith deposit in the postoffice, postage prepaid, a copy of the summons and complaint, directed to the defendant at his place of residence, a simple publication in a local newspaper is in no sense a compliance with statutory requirements, and consequently there was no personal service, and no jurisdiction over appellant or its property was obtained, and the judgment was and is erroneous, if not void. The writ of attachment (Tr. 31–32, Rec. 49) is simply an order to attach. It contains no order to summon defendant, and the only return upon it is of attachment. So it is clear that the only attempt at personal service on appellant shown by the record is the mere publication in a local newspaper of a copy of the complaint. That such personal judgment is void is established by this court.

Penoyer v. *Neff*, 95 U. S. 714, and cases there cited.

2. Regarding the proceeding as one in the nature of a proceeding *in rem*, the question is whether the requirements of the statutes of Arizona as to notice to defendant (appellant) were observed. The remedy by attachment is extraordinary, statutory, and in deroga-

tion of the common law, and therefore the rule is that the statutory provisions upon which the right depends, should be strictly construed, as to both the modes and the subjects of attachment. It is not an independent proceeding, but one merely in aid of an action commenced concurrently with or before the proceeding in attachment.

3 Am. & Eng. Ency. of Law, 2d Ed., 184, and cases there cited.

On page 185 of the same volume the law is briefly and clearly stated as follows: "An attachment is in the nature of, but is not, strictly speaking, a proceeding *in rem*, since that only is a proceeding *in rem*, in which the process is to be served upon the thing itself. If, in an attachment suit, the defendant is served with personal notice or voluntarily appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable under the control of the court to answer any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of notice on him, other than constructive notice, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff."

In *Earle* v. *McVeigh*, 91 U. S. 503, it is stated, "No man shall be condemned in his person or property without notice, and an opportunity to be heard in his defense, is a maxim of universal application; and it affords the rule of decision in this case."

The statute involved in that case provided that notice might be posted on the "front door of the party's usual place of abode," and defendant had removed from the house where notice was posted some six weeks before the posting.

See also, Drake on Attach., 6th Ed., 436 *et seq.*

Cummings v. *Tabor*, 61 Wis. 185.

Warner v. *Webster*, 13 Ohio, 505.

Edwards v. *Toomer*, 14 Smedes & Marshall, 75.

In this case there is no pretense that notice of any kind whatsoever of the *attachment* proceedings was ever given to appellant. True, the statute makes no provision as to how it shall be given, or that it shall be given at all. But it can not be said that such a judgment can be lawfully rendered without notice, at least, of some kind, for to do so would be to take property without due process of law.

In Drake on Attach., 7th Ed., 437, it is stated: "When, however, jurisdiction has been obtained (by levy), the subsequent proceedings must *conform to the law*, in order to make the action of the court effectual. Want of such conformity will be error, and therefore a good ground for reversing the judgment of the court," etc.

The publication of summons was ineffectual to give jurisdiction to proceed to judgment, as the statute requires in this case, that a copy of the summons and complaint should be forthwith deposited in the postoffice, postage prepaid, directed to the defendant (appellant) at its place of residence.

In fact, both the publication of summons and the mailing of a copy of summons and complaint are required to make service complete, and unless complete, there is no service.

The pleadings and affidavit show that the residence of defendant was known, and the record shows that, so knowing it, plaintiff failed to mail a copy of the complaint and summons as required by statute, and hence the record shows such judgment to have been without service.

3. As this is a judgment by default, every requirement of the statute must be complied with, and such compliance must affirmatively appear in the record.

Drake on Attach., Ib.

In this case the failure is patent on the face of the record.

We take it to be a general rule that property taken under attachment proceedings, especially where no personal service is had, before that property can be sold a judgment of condemnation—that is, that it be adjudged to be the property of defendant, subject to sale for the satisfaction of the debt for which it was seized—and that it be sold for that purpose, all of which does not appear. It only appears that property levied upon was ordered sold. No adjudication of an attachment lien.

4. Referring to the eighth assignment of errors, there is evidently emphatic fatal error in the attachment proceedings in this cause, in this, that the writ of attachment was issued and levied before the issuance of the summons in the action.

This was in the face of the statute, and at war with the decided law on the point.

Our statute, acts of 1891, page 49, provides:

"*The plaintiff at the time of issuing the summons or at* any time "thereafter" (not before) "may have the property of the defendant "attached as security for the satisfaction of any judgment that may "be recovered, unless the defendant give security to pay such judg-"ment," etc.

Here is the only license given to attach property, and it must be strictly followed. This does not permit the attachment writ to precede the summons.

The attachment may issue with the summons, or afterward, but not before.

Encyc. Plead., Vol. 3, page 50.

It is void if issued before.

Hall v. *Grogan*, 78 Ky. 11.

Keller v. *Stanley*, 86 Ky. 240.

Low v. *Henry*, 9 Cal. 558.

This last case decides this point, for it is based on a statute precisely like ours, and from which ours was borrowed, using its identical language.

As Arizona took this statute from California, it is assumed that it did so, and adopted also the judicial construction of the act. The court in that case say:

"The twenty-second section of the practice act provides that

"a suit shall be commenced by the filing of a complaint and "the issuance of a summons; and the one hundred and twentieth "section allows the plaintiff at the time of issuing the summons, or "at any time afterward, to have the property of the defendants "attached. These provisions must be strictly followed; and the "attachment, if issued before the summons, is a nullity. The issu-"ance of the summons afterward, can not cure that which was "void from the beginning."

It is useless to elaborate. This is decisive. The Supreme Court of the territory filed no opinion, hence it is impossible to know the views of that court.

We submit that the judgment should be reversed.

WM. H. BARNES,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 140.

THE HENRIETTA MINING AND MILLING COMPANY, APPELLANT,

vs.

JAMES I. GARDNER, APPELLEE.

SPECIFIC CITATION OF AUTHORITIES FOR APPELLANT, FILED BY LEAVE OF COURT.

By leave of the court, granted at the close of the oral argument, appellant cites the following authorities specifically to save labor on the part of the court in selecting pertinent cases cited in a general way in the briefs heretofore filed.

The judgment in the District Court, *in personam*, against appellant, a non-resident of the territory, without personal service of process upon it, or its appearance, is without any validity.

Pennoyer v. *Neff*, 95 U. S. 714.
Galpin v. *Page*, 18 Wall. 366.
D'Arcy v. *Ketchum et al.*, 11 How. 175.
Harris v. *Hardeman*, 14 How. 339.
Story's Com. on Conflict of Laws, Sec. 539.
3 Burge's Colonial Law, p. 1044.
Picquet v. *Swan*, 5 Mason, 40.

The recital in the judgment that "the defendant was duly and regularly served with process herein," will be read by the court in connection with the return of the sheriff that he "personally served" the summons "by causing it to be published," etc., in a local newspaper.

Edwards v. *Toomer*, 14 Smedes & Marshall, 75.
Settlemier v. *Sullivan*, 97 U. S. 444.
Miller v. *Ewing*, 8 Smedes & Marshall, 421.

Torrey v. *Jordan*, 4 How. 401.
Dean v. *McKinstry*, 2 Smedes & Marshall, 213.

Regarding the judgment as *in rem*, the proceeding is statutory and in derogation of the common law, and therefore the rule is that the statutory provisions upon which the right depends should be strictly construed as to both the modes and subjects of attachments. When jurisdiction is obtained by levy, the subsequent proceedings must *conform to the law*, in order to make the action of the court effectual. Want of such conformity will be error, and therefore a good ground for reversing the judgment of the court. Jurisdiction must affirmatively appear on the face of the proceedings.

Drake on Attach., 6 Ed. 436 *et seq.*
Cummings v. *Tabor*, 61 Wis. 185.
Moore v. *Hamilton*, 7 Ill. 429.
May v. *Baker*, 15 Ill. 89.
Haywood v. *McCrory*, 33 Ill. 459.
Haywood v. *Collins*, 60 Ill. 328.
Firebaugh v. *Hall*, 63 Ill. 81.
Louisville, etc, R. R. Co. v. *Parish*, 6 Ind. App. 89.
Wilkie v. *Jones*, Morr. (Iowa), 97-132, 2d Ed.
Musgrave v. *Brady*, Morr. (Iowa), 456 600, 2d Ed.
Tiffany v. *Glover*, 3 Green (Iowa), 387.
Pool v. *Webster*, 3 Metc. (Ky.), 278.
Pierce et al. v. *Merritt et al.*, 13 La. Ann. 526.
Frellson v. *Stewart*, 14 La Ann. 844.
McPherson v. *Snowdon*, 19 Md. 197.
Woolkins v. *Hard*, 49 Mich. 299.
Buckley v. *Lowry*, 2 Mich. 418.
Caldwell v. *Sibley*, 3 Minn. 406.
Rankin v. *Dulaney*, 43 Miss. 197.
Humphrey v. *Wood*, Wright (Ohio), 566.
Gooding v. *Pearce*, 13 R. I. 532.
Caldwell v. *Haley*, 3 Tex. 317.
Banksdale v. *Henderson*, 2 Patt. & H. (Va.), 43.
Delaplain v. *Armstrong*, 21 W. Va. 211.

No presumption will be indulged to support an attachment. Jurisdiction must affirmatively appear.

Frocke v. *Hardman*, 67 Tex. 173.
Haywood v. *Collins*, 60 Ill. 332.

The rule is different only in Georgia, and is there changed by statute.

Force v. *Hubbard*, 26 Ga. 290.

The foregoing authorities apply equally to the two cases preceding this upon the docket against the same appellant, as they were proceedings to establish statutory liens.

WM. H. BARNES,
Attorney for Appellant.

FRANK ASBURY JOHNSON, *of Counsel.*

No. 140
Br. of Stockslager & Heard for Appellee
SUPREME COURT U. S.
FILED
JAN 13 1899
JAMES H. McKENNEY,
Clerk.
Appellee
Filed Jan. 13, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

TERM No. 140.

THE HENRIETTA MINING AND MILLING CO.,
Appellant.

vs.

JAMES I. GARDNER,
Appellee.

S. M. STOCKSLAGER,
GEORGE C. HEARD.
Attorneys for Appellee.

R. T. ELLIOTT, PRT.

In the Supreme Court of the United States

OCTOBER TERM, 1898.

TERM NO. 140.

THE HENRIETTA MINING AND MILLING COMPANY,
Appellant.

vs.

JAMES I. GARDNER,
Appellee.

Appeal from the Supreme Court of Arizona.

Brief for Appellee.

STATEMENT.

This case is before the court on appeal by the appellant, defendant below, from the decision of the Supreme Court of Arizona, affirming the decision of the District Court of Yavapai County, awarding Gardner $12,332.08, and ordering the sale of certain property attached in the proceeding.

The errors assigned are:

(1) That the judgment rendered in the case was a personal judgment, without personal service.

(2) That the attachment lien was foreclosed and property ordered sold without any notice of such attachment proceedings.

(3) Ordering sale of property without finding of facts upon which to base the same, and—

(4) Issuing and executing attachment before issue and delivery of summons.

ARGUMENT.

The first error assigned is that a personal judgment was rendered upon substituted service only.

An examination of the Record shows that no personal judgment was rendered. The court found the amount of principal, interest and costs due and ordered the sale of the property attached to satisfy the same. There was no judgment over for any balance remaining unpaid after sale of attached property.

In the case of Cooper *vs.* Reynolds (77 U. S. 308), this court said:

"But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

"That such is the nature of this proceeding in the latter class of cases, is clearly evidenced by two well-established propositions: First, the judgment of the court, *though in form a personal judgment* against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court

or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendants out of any other property than that attached in the suit."

The judgment in the case at bar is a judgment for the sale of the attached property only, and execution was not awarded for any balance which might remain unpaid after such sale. Hence, it is seen that even though it might be a personel judgment, in form, inasmuch as it seeks to subject the attached property only to the payment of the judgment, it is in fact a judgment *in rem*.

2.

The second alleged error is the foreclosure of the lien, and sale of the attached property without any notice of the attachment proceeding.

It is contended that the publication of the summons, provided for by the Arizona statute, should have contained a notice of the pendancy of the attachment proceedings, as well as of the pendancy of the action.

The statute (Section 712 R. S. 1887), makes no requirement other than that the sheriff shall serve the summons by making publication thereof. "Such *summons shall be published*," etc, is the language of the statute.

An ordinary summons is issued, and in cases of non-residence *such summons* must be published by the sheriff, etc. It is clear, therefore, no notice of the pendancy of the attachment proceedings is

required by the laws of Arizona, but the publication of the summons in the action is sufficient.

A similar question was raised in the case of Redman *vs.* Burgess, before the Court of Appeals of Indiana, and decided June 9, 1898 (Northeast Reporter Vol. 50, p. 285). In that case the court held:

"Attachment and garnishment not being causes of, but incidents to, actions, we do not deem it essential that the affidavits for attachment or the *notice of the pendancy of the suit* should state that the demands were to be enforced by these *auxilliary proceedings*."

Again it has been held by this court, that jurisdiction in such cases is acquired by the levy of the writ of attachment on the defendants' property. Cooper *vs.* Reynolds, *supra* and Pennoyer *vs.* Neff, 95 U. S. 714, and cases cited. In the latter case it is said:

"The law assumes, that property is always in the possession of its owner, in person or by agent, and proceeds upon the theory that its seizure will inform him that it is taken into the custody of the court and that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale."

We contend, therefore, that the publication of the summons was regular in all respects; but that, the defendants' property having been duly attached, and in the custody of the court, jurisdiction thereof was acquired without regard to the regularity of the notice.

3.

Referring to the assignment of error, that the court ordered the attached property sold without any finding of fact on which to base the same, it is only necessary to say that the court found that—

—"the Defendant was *duly* and *regularly served with process herein* and an attachment was *duly* and *regularly levied* upon *its property* in said County of Yavapai. * * *

And it appearing to the court that a writ of attachment heretofore issued in this cause was, on the 26th day of December 1894, by the sheriff of Yavapai County, Arizona, levied upon the following described property of the defendant, all of the right, title and interest of the Henrietta Mining and Milling Company, a corporation, in, and to the following described real estate (describing the property):

It is therefore ordered, adjudged and decreed that said attachment lien as it existed on the 26th day of December, 1894 be, and the same is, foreclosed, and that an order of sale be issued," etc.

Here we have a finding that the Defendant was *duly* and *regularly* served with process, that the attachment was duly and regularly levied of its property in the County of Yavapai and the foreclosure of the attachment lien, as it existed on the day of its levy.

This is certainly amply sufficient to support the order of sale which followed.

If the defendant was *duly* and *regularly* served with process, and the *attachment* was *duly* and

regularly levied of defendants property in the county, as found by the court, all the steps necessary to be taken to make such proceedings regular, were shown to have been taken.

4

In the fourth assignment of error it is alleged that the attachment was issued and executed before issue and delivery of summons.

This statement is not borne out by the Record. The summons was issued on the 26th day of December, and the sheriff's return shows the attachment, which was issued on the 24th day of December, was levied on the 26th, the day the summons was issued.

This proceeding was all in strict accordance with the statutes of Arizona.

Section 649 R. S. 1887, provides that:

"All civil suits in Courts of Record shall be *commenced* by *complaint filed in the office of the clerk of such court.*"

As to issuing attachments, section 42 R. S. 1887 provides:

"No such attachment shall issue until the *suit has been duly instituted,*" etc.

Now, it is seen the commencement of a civil suit is by "filing complaint," and not by issuing summons and delivering it to the sheriff, as in many of the States. It is clear therefore, that the attachment was not irregular, because it was issued be-

fore the issuance of the summons, the suit having been instituted by filing complaint December 4, 1894 (Record p. 29).

Again by the Act of March 6, 1891, amending the attachment law (Acts of 1891 p. 49), it is provided:

"The plaintiff *at the time of issuing summons or at any time afterward*, may have the property of the defendant attached," etc.

From these provisions it results, that a suit is "commenced" by filing complaint with the clerk, and that at any time after such commencement of suit, the plaintiff may have attachment, but that he can not have the property of the defendant attached until "at or after the time of the issuing of summons."

In this case the attachment was not issued until after the commencement of the suit, and the defendant's property was not attached until after the time of the issuing of the summons.

Counsel cites with great confidence two cases from Kentucky and one from California and Vol. 3, page 50 of the Encly. of Pleading, where these authorities are grouped, in support of his contention.

The Kentucky cases do not maintain his position, Keller *vs.* Stanley 86 Ken. 240, quotes the statutes of Kentucky bearing upon this question:

"An action is *commenced* by filing in the office of the clerk of the proper court a petition, stating the plaintiff's cause of action * * * and * * * by causing a summons to be issued or a warning order to be made thereon."

Now let us bear this statute in mind and then look to see what their Kentucky statute is as to when an attachment may be issued. Section 194 of the Civil Code of Kentucky provides that the plaintiff may at or *after the commencement of an action*, have an attachment issued against the defendant. In deciding the case above cited the court holds that there was no summons issued prior to the issuance of the attachment, hence the attachment was void, the action not having been commenced. The other Kentucky case is cited by the court in deciding the Keller case and this case, as we take it, is but a re-affirmation of the doctrine contained in the latter case.

Counsel chiefly relies on the case of Low *vs.* Henry, 9 Cal. 538. Justice Baldwin in deciding that case holds, that the attachment was void, because it was issued *before the action was commenced;* but in his decision he cites the 22nd section of the practice act, then in force in California, which provides that a suit shall be *commenced* by the *filing of a complaint* and the *issuance of a summons.*

Here the attachment having been issued before the issuance of summons, it was issued *before the action was commenced*, and was therefore contrary to the statute, and void.

Counsel cites this case as being in point and decisive of the case at bar. But, as we have seen when the difference in the statutes of California and Arizona is considered, that case has no bearing whatever upon the question at issue.

Counsel is therefore in error, as appears from his

quotation of the California statues at pages 7 and 8, of his brief, in his statement, that the Arizona statute was taken from that of California and is precisely like it, using its identical language.

It may be contended that under the second assignment of error, which is that the sale of defendant's property was ordered "without there having been any actual or constructive notice of any kind whatever given to defendants of the institution of any such proceedings *or of any other kind*, raises the question of the sufficiency of the notice of publication.

So far as the attachment is concerned (and there is nothing else involved in the case), we have seen that the court acquired jurisdiction by the levy of the attachment of the property of the defendant, in the said county of Yavapia.

With such levy and taking into the custody of the court, complete jurisdiction over it was acquired by the court. Cooper *vs.* Reynolds and Pennoyer *vs.* **Neff**, *supra*.

This being the case it is hardly necessary to pursue the argument further.

But, aside from this view of the law, this court, in the case of Applegate *et al*, *vs.* Lexington and Carter County Mining Co. *et. al.* (117 U. S. 255) held:

"When a court of general jurisdiction is authorized to bring in, by substituted service, non-resident defendants interested in property within its jurisdiction, but is not required to place the proof of service upon the record, and it orders such service, it will be presumed in favor of the jurisdiction

that service was made as ordered, although no evidence thereof appears of record; and a judgment affecting the property will be valid."

It was contended in the Supreme Court of Arizona, that the judgment did not show that a copy of the summons was mailed to the defendant, as required by section 713, Revised Statutes of 1887, in cases where the residences of non-resident defendants are known.

But the Arizona Statute makes no provision for *proof* of this fact. It results that the court may require such proof of this fact as may seem proper to it, and it certainly will not be insisted that when there is no statutory provision as to any return or proof of this fact, the court would be required to state what proof was received, or to make any special reference to it in the finding.

The contention that the Record shows this particular statutory requirement was *not* complied with, is shown to be erroneous by an inspection of the judgment. The most that can be said is, that the record is *silent* upon the point. But, the court does find "the defendant was duly and regularly served with process herein." This is all that is necessary. This court will presume the lower court had sufficient proof of that fact before it.

In cases where the Record is silent, in a court of general jurisdiction, acting within the boundaries which the law assigns to it, the court is presumed to have acted rightly and to have jurisdiction to render the judgment it pronounces until the contrary appears.

If the Record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge.

Settlemier *vs.* Sullivan (97 U. S. 444). See also, Gilchrist *vs.* Cannon (1 Coldw.–Tenn–581).

There is nothing in the Record to contradict the finding of the court that the defendant was duly and regularly served with process.

It may be doubted also whether this requirement of the plaintiff, to mail a copy of the summons, in this class of cases is essential. The Supreme Court of Minnesota have held otherwise, as we understand their decision. In the case of Bausman *vs.* Tilley, decided April 8, 1891 (48 N. W. Reporter 459), which was a motion by a non-resident defendant within one year after judgment by default, upon substituted service, for leave to answer and defend, under provision of section 66 general statute of 1878. It was contended that as it was admitted a copy of summons was mailed and not shown it was not received, there had been *personal* service and the defendant was not entitled to the provisions of section 66 *supra*.

The court held there was no distinction in the statute between non-residents whose residence was known and copy of summons mailed to them and those whose residences were unknown, and proceeded to say :

"In all of the cases covered by and provided for in section 64, there must be substituted service, that is, by publication of the summons in the manner

specified in section 65 and it is by virtue of this publication that the court acquires jurisdiction. *It is of no consequence*, except as the fact might bear upon the question of diligence, that a copy of the summons has been mailed to or received by the defendant at his place of residence outside of the territorial limits of the State."

Of still less importance is it in a case like the one at bar where jurisdiction of the property was acquired by levy of the attachment.

Again, as the defendant in the case at bar made default and filed no motion for a new trial or rehearing, its appeal brings before this court for review the judgment roll only. What the judgment roll shall consist of is fixed by statute in Arizona. Section 810 R. S. 1887, provides that the following papers shall constitute the judgment roll in cases where there has been no answer filed:

"The summons with the return of service, the complaint and a copy of the judgment."

The statute does not require the *sheriff* or other officer to mail copy of the summons, and of course proof of that fact could constitute no part of the "return of service" of summons as the sheriff alone makes return. Neither does the statute require plaintiff to file his affidavit showing such mailing to have been done. It is silent as to how this statutory requirement shall be proven.

This being the case, the court may hear oral proof of the fact, at the trial. And when in its judgment it is stated that the defendant was "duly

and regularly served with process," it will be presumed such proof was required as satisfied the court, the law had been complied with. It was not necessary to set out the proof made as to such mailing, and the Record being silent, regularity will be presumed. Settlemier *es.* Sullivan, *supra.*

We submit that the judgment of the Supreme Court of Arizona should be affirmed.

S. M. Stockslager,
George C. Heard.
Attorneys for Appellee.

down in *United States* v. *Tynen*, 11 Wall. 88, 92, that "when there are two acts on the same subject the rule is to give effect to both if possible; but if the two are repugnant in any of their provisions, the latter act without any repealing clause operates, to the extent of the repugnancy, as a repeal of the first."

THE case is stated in the opinion.

Mr. Frank A. Johnson for appellant. *Mr. William H. Barnes* filed a brief for same.

Mr. S. M. Stockslager for appellee. *Mr. George C. Heard* was on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an appeal from a judgment of the Supreme Court of the Territory of Arizona, affirming a judgment of the district court of the fourth judicial district, in and for Yavapai County, for $12,332.08 in favor of appellee and against appellant, who was plaintiff in error below. The action was upon an open account and a large number of assigned accounts. An attachment was sued out and the mines and mining property of appellant company were seized. Judgment was rendered by default, and the property attached ordered sold.

The judgment is attacked on two grounds: (1) That there was no personal service on appellant; (2) that the attachment was void because the writ was issued before the issuance of summons.

It is conceded that the appellant is an Illinois corporation, and that there was no personal service upon it. Was the attachment issued in accordance with the statutes of Arizona? If it was not, the judgment must be reversed. *Pennoyer* v. *Neff*, 95 U. S. 714.

The record shows that the complaint was filed December 4, 1894; that on the 24th of that month affidavit and bond for attachment were filed and the writ was issued. The return shows the seizure of the property on the 26th of December, the day summons was issued.

Opinion of the Court.

The Revised Statutes of Arizona of 1887, chapter 1 of title IV, provided for attachments and garnishments as follows:

"40 (Sec. 1). The judges and clerks of the district courts and justices of the peace may issue writs of original attachment returnable to their respective courts, upon the plaintiff, his agent or attorney, making an affidavit in writing, stating one or more of the following grounds:

"1. That the defendant is justly indebted to the plaintiff, and the amount of the demand; and,

"2. That the defendant is not a resident of the Territory, or is a foreign corporation, or is acting as such; or,

"3. That he is about to remove permanently out of the Territory, and has refused to pay or secure the debt due the plaintiff; or,

"4. That he secretes himself, so that the ordinary process of law cannot be served on him; or,

"5. That he has secreted his property, for the purpose of defrauding his creditors; or,

"6. That he is about to secrete his property for the purpose of defrauding his creditors; or,

"7. That he is about to remove his property out of the Territory, without leaving sufficient remaining for the payment of his debts; or,

"8. That he is about to remove his property, or a part thereof, out of the county where the suit is brought, with intent to defraud his creditors; or,

"9. That he has disposed of his property, in whole or in part, with intent to defraud his creditors; or,

"10. That he is about to dispose of his property with intent to defraud his creditors; or,

"11. That he is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

"12. That the debt is due for property obtained under false pretences.

"41 (Sec. 2). The affidavit shall further state:

"1. That the attachment is not sued out for the purpose of injuring or harassing the defendant; and,

"2. That the plaintiff will probably lose his debt unless such attachment is issued.

"42 (Sec. 3). No such attachment shall issue until the suit has been duly instituted, but it may be issued in a proper case either at the commencement of the suit or at any time during its progress.

"43 (Sec. 4). The writ of attachment above provided for may issue, although the plaintiff's debt or demand be not due, and the same proceeding shall be had thereon as in other cases, except that no final judgment shall be rendered against the defendant until such debt or demand shall become due."

Paragraph 649 provides that "all civil suits in courts of record shall be commenced by complaint filed in the office of the clerk of such court." Therefore, if paragraph 42 (section 3) was in force at the time the writ of attachment was issued, to wit, on the 24th of December, 1894, there is no doubt of the validity of the writ. But it is contended that the paragraph was not in force, because, it is claimed, it had been repealed by an act passed by the legislative assembly of the Territory, approved March 6, 1891.

This act is entitled "An act to amend chapter 1, title 4, entitled 'Attachments and garnishments,' Revised Statutes of Arizona, 1887." Section 1 is as follows:

"SECTION 1. Paragraph 40, being section 1, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended so as to read as follows:

"The plaintiff at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment as in this act provided in the following cases:

"First. In an action upon a contract, express or implied, for the direct payment of money where the contract is made or is payable in this Territory, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property.

"Second. When any suit be pending for damages, and the

defendant is about to dispose of or remove his property beyond the jurisdiction of the court in which the action is pending, for the purpose of defeating the collection of the judgment.

"Third. In any action upon a contract, express or implied, against the defendant not residing in this Territory or a foreign corporation doing business in this Territory.

"SEC. 2. Paragraph 41, being section 2, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended so as to read as follows:

"Section 2. The clerk of the court or justice of the peace must issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, showing —

"First. That the defendant is indebted to the plaintiff upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this Territory, and that the payment of the same has not been secured as provided in section 1 of this act, and shall specify the character of the indebtedness, that the same is due to plaintiff over and above all legal set-offs or counter claims, and that demand has been made for the payment of the amount due; or,

"Second. That the defendant is indebted to the plaintiff, stating the amount and character of the debt; that the same is due over and above all legal set-offs and counter claims; and that the defendant is a non-resident of this Territory or is a foreign corporation doing business in this Territory; or,

"Third. That an action is pending between the parties, and that defendant is about to remove his property beyond the jurisdiction of the court to avoid payment of the judgment; and,

"Fourth. That the attachment is not sought for wrongful or malicious purpose, and the action is not prosecuted to hinder or delay any creditor of the defendant.

"SEC. 3. Paragraph 43, being section 4, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby repealed.

"SEC. 4. Paragraph 47, being section 8, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended by

striking out the word 'original' where it occurs in the first line of said section.

"SEC. 5. Paragraph 50, being section 11, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended by striking out the word 'repleviable' where it occurs in line five of said section.'

"SEC. 6. All acts and parts of acts in conflict with this act are hereby repealed, and this act shall take effect and be in force from and after its passage.

"Approved March 6, 1891."

The amending act is more than a revision of the provisions of the statute of 1887: it is a substitute for them. It, however, does not expressly repeal paragraph 42. Does it do so by implication? Expressing the rule of repeal by implication, Mr. Justice Strong, in *Henderson's Tobacco Company*, 11 Wall. 657, said:

"Statutes are indeed sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing manifests a clear intent to abolish the old law. In *United States* v. *Tynen* it was said by Mr. Justice Field, that 'when there are two acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' For this several authorities were cited, some of which have been cited on the present argument. This is, undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new

provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed."

May paragraph 40, as amended, subsist with paragraph 42? Certainly not, if the former prescribes the time when the writ of attachment may be issued, and not the time when it may be levied. Its identical language was section 120 of the Practice Act of California, and was continued as 537 of the Code of Civil Procedure of said State, and was such at the time the act of 1891 of Arizona was passed. When part of the Practice Act, it was construed by the Supreme Court of California in the case of *Low* v. *Henry*, 9 California, 538. Mr. Justice Burnett, speaking for the court, said:

"The twenty-second section of the Practice Act provides that a suit shall be commenced by the filing of a complaint and the issuance of a summons; and the one hundred and twentieth section allows the plaintiff, 'at the time of issuing the summons, or at any time afterwards,' to have the property of the defendants attached. These provisions must be strictly followed, and the attachment, if issued before the summons, is a nullity. *Ex parte Cohen*, 6 California, 318. The issuance of the summons afterwards cannot cure that which was void from the beginning."

Counsel for appellee, however, urges that this decision is explained by the fact that by the California laws a suit was commenced by *filing a complaint* and the *issuance* of a *summons*, and that the decision of the court was that the attachment having been issued before summons was issued, it was issued before the commencement of suit, and hence was void on that ground. We think not. "To have the property of the defendant attached" was construed to mean the issuance of the attachment, and it was held to be a nullity if done before the summons was issued. If, however, ambiguity could arise under the Practice Act and the Code of Civil Procedure as originally passed, it could not arise after the code was amended in 1874, and as it existed at the time of the Arizona enactment of 1891. At that time the issuance of summons

HENRIETTA MINING AND MILLING COMPANY *v.* GARDNER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 140. Argued January 16, 1899. — Decided February 20, 1899.

The provisions in the Revised Statutes of Arizona of 1887, c. 42, § 3, concerning the commencement of process for attachment, are inconsistent with those concerning the same subject contained in the act of March 6, 1891; and although chapter 42 is not expressly repealed by the act of 1891, it must be held to be repealed by the later act on the principle laid

was not the commencement of the action. The amendment of 1874 (Amendment of the Codes 1873–4, 296) provided that "civil actions in the courts of the State are commenced by filing a complaint," (section 405,) and summons may be issued at any time within one year thereafter (section 406). Section 537, which provided for the issuance of an attachment and which was adopted by the Arizona statute, was not changed. Notwithstanding the amendment of 1874, we have been cited to no case reversing or modifying *Low* v. *Henry*, nor is it claimed that the practice did not continue in accordance with the ruling in that case. Indeed, how could there be change? The provisions of the code did not need further interpretation. The procedure was clearly defined. An action was commenced by filing a complaint. Within a year summons might be issued, and when issued the plaintiff might have the property of the defendant attached, that is, have an attachment issued.

The language of paragraph 40, as amended in 1891, having been taken from the California code, it is presumed that it was taken with the meaning it had there, and hence we hold it worked a repeal of paragraph 42 of the Revised Statutes of Arizona of 1887; and the judgment of the Supreme Court of the Territory is

Reversed and the cause remanded for further proceedings in accordance with this opinion.